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Fearful Asymmetry: Employee Free Choice and Employer Profitability in *First National Maintenance*

RICHARD LITVIN*

INTRODUCTION

A chill wind now blows through the "insulat[ion protecting] employees' jobs from [their exercise of] their organizational rights."¹ At common law, employees who formed unions risked their jobs. The law did not require employers to respect their employees' right to associate;² indeed, it granted employers an unlimited power to discharge.³ This power and its incidents—the blacklist, the yellow dog contract, and the runaway shop—were potent weapons in the battle to prevent unionization.⁴ As a result, unions and those employees who wanted union representation had to overcome not only employer resistance, but also employee fear of employer retribution.⁵

The advent of the National Labor Relations Act⁶ (the NLRA or Act) ap-

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¹ *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

² The powers of government were generally aligned against employee self-organization, not in its support. See, e.g., A. COX, *LAW AND THE NATIONAL LABOR POLICY* 1-4 (1960); C. GREGORY & H. KATZ, *LABOR AND THE LAW*, 52-82 (3d ed. 1979) [hereinafter cited as C. GREGORY].

³ See Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEG. HIST. 118 (1976). Absent statutory or contractual limitations, an employer's power to terminate the employment relationship remained unfettered until very recently. See, e.g., Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

⁴ J. CARPENTER, *COMPETITION AND COLLECTIVE BARGAINING IN THE NEEDLE TRADES, 1910-1967* (1972), summarized the problem:

Unions could not prevent discrimination against their own men. Some shop owners compelled their workers to deposit cash security, augmented by regular deductions from their paychecks, as insurance against joining labor unions or participating in strikes. Other employers closed their shops long enough to rid themselves of union members and then reopened at other locations or under different names. Still others exchanged blacklists to prevent discharged union men from obtaining work elsewhere. . . . [Others] posted notices that . . . they would operate their shops on an "open shop" basis—a condition tantamount to the exclusion of all union men from employment.

Id. at 4. See generally P. TAFT, *ORGANIZED LABOR IN AMERICAN HISTORY* (1964); J. RAYBACK, *A HISTORY OF AMERICAN LABOR* (1959).

⁵ From 1915-1937 recognition of a union was an issue in 20% to 50% of all strikes. P. EDWARDS, *STRIKES IN THE UNITED STATES, 1881-1974*, at 37 (1981). See also Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1078 (1937).

⁶ National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)). The Wagner Act has been amended in relevant part by the Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (1947), and the Labor-

peared to change all that.⁷ The Act recognized a cluster of employee associational rights,⁸ forbade employer "interfere[nce]" with those rights,⁹ and established a system for determining the employees' free choice as to whether and by whom to be represented.¹⁰ It was in an early case construing the NLRA that the Supreme Court broadly declared: "The policy of the Act is to insulate employees' jobs from [the exercise of] their organizational rights."¹¹

Although the Court has never applied literally the Act's proscription on interference,¹² it has often been quite solicitous of employee rights and sensitive to the potential chilling effect of employer speech and conduct.¹³ But

Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959). The current version of the Act will be hereinafter cited as NLRA.

⁷ C. GREGORY, *supra* note 2, at 224, 230, commented:

In the NLRA, however, Congress virtually ordered employers to stop resisting the spread of unionism, telling them that the desire of their employees to organize was none of their business and to keep their hands off.

...

In brief, Congress found that the strife over organizational activities of unions had caused so much harm to the National economy that the best way to secure relief to the body economic was to let employees organize as they saw fit . . .

See also Remarks of Senator Wagner, 78 CONG. REC. 3443 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15-17 (1949) [hereinafter cited as LEG. HIST. NLRA].

⁸ NLRA § 7, 29 U.S.C. § 157 (1976).

⁹ NLRA § 8(a)(1), 29 U.S.C. § 158(a) (1976). The other subparts of § 8(a) forbade employer domination of unions and discrimination for or against unions, and mandated collective bargaining. NLRA § 8(a)(2)-(5), 29 U.S.C. § 158(a) (1976). Undisputed legislative history supports the view that the other subparts of § 8(a) "amplify" . . . [but do not] limit in any way the interpretation of the general provisions" H.R. REP. NO. 969, 74th Cong., 1st Sess. 15 (1935), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 7, at 2924. See Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1289, 1323-24 (1968).

The Supreme Court's decision in *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), has been thought by some to be inconsistent with this legislative mandate. Christensen & Svanoe, *supra*. But *Darlington* may be read as consistent with congressional intent, since the Court there said: "[S]ome employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1), whether or not they involved sound business judgment, unless they also violated § 8(a)(3)." 380 U.S. at 269. Section 8(a)(1) has always been read to require an accommodation of employee rights with legitimate employer interests. See *infra* note 12. Hence *Darlington* may mean nothing more than that an employer's legitimate interests which need to be accommodated are not limited to its exercise of "sound business judgment."

¹⁰ NLRA § 9, 29 U.S.C. § 159 (1976).

¹¹ *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

¹² An employee who fails to perform the work for which he is paid or who destroys the employer's property may be the key organizer in the plant. Firing such an employee could seriously impede organization, but no one would seriously suggest that an employer thereby commits an unfair labor practice. The crucial problems in such a case are causation and motivation. See *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1612 (1982).

¹³ Where an employer granted benefits to persuade its employees to vote against unionization, the Court saw "a fist inside the velvet glove." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). And in balancing an employer's right of free speech against its employees' freedom to unionize, the Court took "into account the economic dependence of the employees

with increasing frequency the Court has ignored or discounted the impact of employer actions, and of its own decisions, on undisputed employee associational rights.¹⁴

In *First National Maintenance Corporation v. NLRB*,¹⁵ the Court cut a gaping hole in what remained of the insulation. The Act requires an employer to bargain with the representative of its employees "with respect to wages, hours, and other terms and conditions of employment."¹⁶ The question expressly presented in *First National Maintenance* was whether an employer must bargain over an economically motivated decision to close part of a business.¹⁷ The Court held that an employer need not bargain over the decision to partially shut down its operations,¹⁸ and also asserted that a union which insists on such bargaining violates the Act.¹⁹

The central thesis of this article is that the Court in *First National Maintenance* unwittingly handed to careful, well-advised, anti-union employers a powerful weapon for chilling unionization.²⁰ Proving motiva-

on their employer, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (emphasis added).

¹⁴ For example, in *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272 (1972), the Supreme Court held that a successor employer which hires a majority of its employees from among those of its unionized predecessor must bargain with the union, but that the successor has no obligation to prefer the predecessor's employees in hiring its workforce. As a practical matter, *Burns* encourages a successor employer to free itself of its predecessor's union by devising facially neutral hiring practices which effectively avoid employing the predecessor's employees. See *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974); *Morris & Gaus, Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns*, 59 VA. L. REV. 1359, 1391 (1973). See generally Barron, *A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court's Interpretation of the National Labor Relations Act*, 59 TEX. L. REV. 421 (1981); Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735 (1965). (Professor Getman's views have changed. See discussion *infra* notes 255-81 and accompanying text.)

¹⁵ 452 U.S. 666 (1981).

¹⁶ NLRA § 8(d), 29 U.S.C. § 158(d) (1976).

¹⁷ In theory, bargaining over the decision itself (decision bargaining) can be distinguished from bargaining over the effects of the decision (effects bargaining). The Court clearly asserted that the latter is mandatory. 452 U.S. at 681-82. Indeed the Court relied on the employees' ability to protect their interests through effects bargaining to discount their need for decision-bargaining. See discussion *infra*, notes 318-21 and accompanying text. The practical difficulties with this distinction are considered *infra*, note 319 and accompanying text.

¹⁸ 452 U.S. at 686.

¹⁹ *Id.* at 675, n.13. The Court was merely reiterating dicta first pronounced in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). In *Borg-Warner*, it was an employer, not a union, which insisted on bargaining on a non-mandatory subject. Hence, the Court had no need to consider the material differences between limiting the subjects on which management may insist and limiting those on which a union may insist (i.e., strike). Despite *Borg-Warner's* vintage and the apparently universal acceptance of its applicability to union insistence, a secondary thesis of this article is that Congress forbade such implied limitations on a union's use of concerted activities. See *infra* notes 214-18 and accompanying text.

²⁰ This weapon is especially significant in light of the resurgence of union-busting. See,

tion is difficult.²¹ Proving that a well-counseled employer, which has built a record to demonstrate its economic motivation, was really motivated by anti-union animus will often be impossible.²² As a result, unless *First National Maintenance* is construed narrowly or the constraints on union power to resist such employer acts are lifted, employees can depend neither on the Board nor on their own economic weapons to protect their decision to unionize. Thus, the potential for employer manipulation is great, and the risk to employee free choice is severe.

The facts of *First National Maintenance* itself illustrate these dangers.²³ The First National Maintenance Corporation (FNM) decided to discontinue services at a single location hard upon the vote of its employees at that location in favor of union representation.²⁴ FNM claimed that its decision was motivated solely by economics and refused to bargain with the newly certified union.²⁵ The employer, however, proffered only conclusory testimony that the location which it closed was unprofitable, and no evidence at all that it was less profitable than other non-union locations which were not closed, or that profitability had declined at the time of the decision, or even that it could recoup capital from the closing which it could re-invest at a higher return.²⁶

Those employees who were terminated might reasonably have inferred that, but for their choice of a union, they would still have their jobs. More important, FNM's employees at other locations and even employees of other employers, observing what had happened to the discharged employees, might have been discouraged from exercising rights and engaging in ac-

e.g., Bernstein, *Union-Busting: From Benign Neglect to Malignant Growth*, 14 U.C.D. L. REV. 1 (1980) (relying on extensive testimony before congressional committees, cited *id.* at 1 n.3); *Regulating Use of Labor Consultants*, 1981 LAB. REL. Y.B. 133 (1982); *Union Organizing Campaigns and Women*, *id.* at 225, 227; Martin, *Labor Nemesis*, Wall St. J., Nov. 19, 1979, at 1, col. 5.

²¹ Corbin put it aptly:

In an ancient case, Y.B. 17 Edw. IV, 2, Brian, C.J., remarked, perhaps erroneously, that "the devil himself knoweth not the thought of man." Every day experience shows that man himself believes that he can discover the thoughts of another man. This he does by inferences from the other's external expressions, in words, in features, and in acts. *Such evidence may indeed lead to woeful error*; but it is the best we have and we act upon it daily.

3 A. CORBIN, CORBIN ON CONTRACTS § 597, at 582 n.5 (1960) (emphasis added).

The problem of proving motivation is pervasive not only in labor law, *see, e.g.*, *Mueller Brass Co. v. NLRB*, 544 F.2d 815 (5th Cir. 1977); *Christensen & Svano*, *supra* note 9, but in all areas of the law in which discrimination is relevant. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 & n.21 (1977); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1028-32 (1978); Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119-24.

²² *See infra* notes 289-91 and accompanying text.

²³ The facts are discussed in more detail *infra* notes 107-12.

²⁴ *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 669-70 (1981).

²⁵ *Id.*

²⁶ *See generally* Transcript of ALJ Hearing, discussed *infra* note 112.

tivities supposedly protected by the Act.²⁷ Yet the Court did not consider either the difficulty of proving anti-union animus, the ease with which an employer can build an "economic" record, or the severity of impact on employee free choice.²⁸

First National Maintenance has already sparked much controversy,²⁹ and more is sure to follow. While the Court's holding was limited to "economically motivated" partial closings, a not insignificant subject, its proposed standard for determining the duty to bargain would reach a much broader range of cases involving "management decisions that have a substantial impact on the continued availability of employment"³⁰ Moreover, its fresh, broad reading of statutory purpose has implications that go far beyond duty to bargain issues.

Section I of this article explores the legal setting. It considers the significance of the mandatory-permissive dichotomy, the tests that the Court has hitherto used for classifying subjects, and the evolution of doctrine relating to partial closings.

Section II analyzes the Court's reasoning in *First National Maintenance*. It shows that the Court's new test of bargainability is asymmetrical (heavily weighted in favor of management's interests) and that the Court attempted to justify this by a novel reading of statutory purpose.

Section III criticizes the Court's argument on four broad grounds. First, while the Court's reading of statutory purpose justifies consideration of management's interests, it does not justify insulating those interests at

²⁷ On the statutory relevance of the chilling of employees generally, see *infra* notes 280-86 and accompanying text.

²⁸ Under the more progressive theories of the common law, a union facing such an attack on its very existence would have had the right of self-defense. See C. GREGORY, *supra* note 2, at 76-82. Since the Court apparently approved the notion that a union may not use its economic weapons to force bargaining over a nonmandatory subject, *First Nat'l Maintenance* may put employers in a better position to use partial closings to thwart unionization than they would have been before the Act. See Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1547 (1981), who argues that the theory of "industrial pluralism" leads to such results: "[t]he Act guarantees the company's presence at the bargaining table, but despite the mandate in its statement of purpose, it does not equalize the bargaining power of the parties. If anything, it places limits on many of the traditional sources of the union's strength" (emphasis added) (footnotes omitted).

²⁹ See, e.g., Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 5-18 (1981); Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); Irving, *Closing and Sales of Businesses: A Settled Area?*, 33 LAB. L.J. 218 (1982); *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 17, 329-38 (1981); Note, *Enforcing the NLRA: The Need for a Duty to Bargain over Partial Plant Closings*, 60 TEX. L. REV. 279 (1982). See also Barron, *supra* note 14, at 434-38; Van Wezel Stone, *supra* note 28, at 1544-59. For valuable commentary on the case before it reached the Court, see Heinsz, *The Partial-Closing Conundrum: The Duty of Employers and Unions to Bargain in Good Faith*, 1981 DUKE L.J. 71 (1981); Note, *Partial Closings: The Scope of an Employer's Duty to Bargain*, 61 B.U.L. REV. 735 (1981).

³⁰ See *First Nat'l Maintenance*, 452 U.S. at 676.

the expense of chilling employee free choice. Second, Congress specifically protected the employees' right to use their economic weapons absent express statutory limitations thereon; the requirement that unions bargain in good faith as to "wages, hours, and other terms and conditions of employment" cannot reasonably be read as providing such a limitation. Third, an appropriate (neutral) balancing of interests shows that the Court's "employer-protective" rule, at least if broadly construed, seriously and systematically threatens employee free choice; the alternative "employee-protective" rule poses no such risks to employer profitability. Fourth, the doctrine of judicial deference to administrative authority is particularly appropriate to the issue of the scope of bargaining under the NLRA.

I. THE LEGAL SETTING

A. *The Statutory Basis*

First National Maintenance must be understood in the context of the statutory and case law history through which federal regulation of the subjects of collective bargaining developed. The original Act (the Wagner Act of 1935) spoke cryptically, if at all, of the scope of the duty to bargain. In section 8(a)(5)³¹ Congress declared it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." And section 9(a)³² added that the majority's representatives "shall be the *exclusive representatives* . . . in respect to rates of pay, wages, hours of employment, or other conditions of employment."

These provisions could have been read separately. Under that approach, section 8(a)(5) would have required that an employer accord true recognition to the properly selected union, but would not have given the Board authority to define "the scope of the ensuing negotiations."³³ And section 9(a) would have established only the topics on which the selection of a union would preclude an employer from bargaining with individual employees³⁴ or from granting exclusive status to a minority union; but it would not have required an employer to bargain on the topics.³⁵ Indeed, the oft-cited language of Senator Walsh, the chairman of the Senate Committee on Education and Labor, supported that reading:

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort

³¹ NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976).

³² NLRA § 9(a), 29 U.S.C. § 159(a) (1976) (emphasis added).

³³ Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 394 (1950).

³⁴ See *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

³⁵ See *ILGWU v. NLRB* (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961). Cf. *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962).

them to the door of their employer and say, "Here they are, the legal representatives of your employees." *What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.*³⁶

Alternatively, the sections could have been read together as establishing that if an employer refused to bargain on any topic within the union's exclusive competence under section 9(a), it would violate section 8(a)(5).

Though the statutory language does not clearly establish Congress' original intent on this point, the Board soon concluded that it could not meaningfully enforce the duty to bargain unless it could "identify the plant relationships subjected by the statute to the obligation to bargain."³⁷ The Board then proceeded to identify such mandatory subjects of bargaining as work schedules,³⁸ subcontracting,³⁹ and pensions.⁴⁰ In passing the Taft-Hartley Act in 1947, Congress clearly endorsed the Board's position by amending the NLRA to include in section 8(d) a definition of "collective bargaining" as "the performance of the mutual obligation of the employer and the representative of the employees to . . . confer . . . with respect to wages, hours, and other terms and conditions of employment."⁴¹

B. The Administrative and Judicial Framework

1. Incidents of the Mandatory-Permissive Classification

The Board has gone beyond the literal notion that an employer (or union) fulfills its duty to bargain on mandatory subjects if it engages in a reasoned discussion without foreclosing at the outset the possibility of accommodation.⁴² With the Supreme Court's approval,⁴³ the Board has recognized a constructive refusal to bargain in a variety of contexts.⁴⁴ Under

³⁶ 79 CONG. REC. 7660 (1935) (emphasis added).

³⁷ Findling & Colby, *Regulation of Collective Bargaining by the National Labor Relations Board—Another View*, 51 COLUM. L. REV. 170, 182 (1951).

³⁸ Wilson & Co., 19 N.L.R.B. 990, 999, *enforced*, 115 F.2d 759 (8th Cir. 1940).

³⁹ Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

⁴⁰ Inland Steel Co., 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). For an extensive analysis of the Board opinions defining mandatory subjects of bargaining prior to the adoption of the Taft-Hartley Act, see Cox & Dunlop, *supra* note 33, at 391-401. Cox and Dunlop decried this "increasing tendency towards government regulation of both the processes of collective bargaining and the terms of collective agreements"; but even they recognized that some movement in that direction "was perhaps inevitable." *Id.* at 389-90.

⁴¹ Ch. 120, 61 Stat. 136, 142-43 (1947), 29 U.S.C. § 158(d) (1976). The Taft-Hartley Act also amended the NLRA by extending the duty to bargain to unions. 29 U.S.C. § 158(b) (1976).

⁴² General Electric Co., 150 N.L.R.B. 192 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

⁴³ *NLRB v. Katz*, 369 U.S. 736 (1962).

⁴⁴ The Board so held in many early cases. See, e.g., Wilson & Co., 19 N.L.R.B. 990, *enforced*, 115 F.2d 759 (8th Cir. 1940). The Supreme Court approved this doctrine, while leaving open

this doctrine, an employer (or a union) which institutes a unilateral change on a mandatory subject without first bargaining to impasse is deemed to have refused to bargain.⁴⁵

Similarly, the Board has gone beyond the literal proposition that either party may refuse to discuss a permissive subject, holding that an employer who insists to impasse that a union accede to its position on a permissive subject (or uses its economic power to gain agreement) is deemed to have refused to bargain.⁴⁶ In *NLRB v. Wooster Division of Borg-Warner Corp.*,⁴⁷ a case critical to the understanding of *First National Maintenance*, the Supreme Court approved the Board's rule that employer insistence on a permissive subject amounts to a refusal to bargain. Although the majority never discussed whether the same rule should apply to union insistence on a non-mandatory subject, Justice Harlan in dissent casually equated the situations—denying the appropriateness of the rule to either.⁴⁸ This extension is, at least superficially, persuasive; for sections 8(a)(5) and (b)(3) make it an unfair labor practice for either an employer or a union "to refuse to bargain collectively," and section 8(d) provides a single definition for collective bargaining.⁴⁹

Two other facets of bargaining should be noted. An employer may insist to impasse on retaining (or, more properly, regaining) unilateral control over a mandatory topic, by including it in a management rights clause.⁵⁰

the possibility that in some cases an employer might successfully justify its unilateral action. *Katz*, 369 U.S. at 748.

⁴⁵ *Katz*, 369 U.S. at 743. It should be noted that the extension of this rule to unions is less clear. In *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), the Supreme Court rejected the Board's finding that a union violated its duty to bargain under § 8(b)(3) by engaging in a partial work stoppage which, in effect, temporarily changed work practices. More recently, the Second Circuit found that a union which had unilaterally adopted and enforced a work rule limiting production of journeymen painters to ten rooms a week had violated its duty to bargain. *New York Dist. Council No. 9 v. NLRB*, 453 F.2d 783 (2d Cir. 1971).

⁴⁶ *Dalton Tel. Co.*, 82 N.L.R.B. 1001 (1949), *enforced*, 187 F.2d 811 (5th Cir.), *cert. denied*, 342 U.S. 824 (1951).

⁴⁷ 356 U.S. 342 (1958).

⁴⁸ *Id.* at 359.

⁴⁹ Although the principle of *Borg-Warner* has been criticized, Harlan's suggestion that the doctrine must be equally applied to unions has been universally accepted. See e.g., *First Nat'l Maintenance*, 452 U.S. at 675 n.13; *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 17, 329 n.2 (1981); R. GORMAN, *BASIC TEXT ON LABOR LAW* 523-24 (1976). This article contends that the extension of *Borg-Warner* to unions squarely conflicts with legislative history and statutory policy. See *infra* notes 214-18 and accompanying text.

⁵⁰ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). The Court reasoned to this consequence from § 8(d) of the Act which defines the obligation to bargain as "not compell[ing] either party to agree to a proposal or requir[ing] the making of a concession." 29 U.S.C. § 158(d) (1976). In *American Nat'l Ins.* the proposed management rights clause covered but a few mandatory topics. In later cases employers have insisted on management rights clauses so broad that they would leave employees effectively worse off under a collective agreement than without it. The courts of appeals have split on the propriety of such demands. Compare *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958) (held proper over the stinging dissent of Judge Rives) with *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131,

Additionally, if an employer has insisted to impasse on its position on a mandatory topic, it may then unilaterally institute its proposal.⁵¹

In short, these decisions establish constructive rights and limitations arising from the classification of a subject as either mandatory or permissive. The net result is that, even as to mandatory subjects, the ultimate decision-making authority resides in the employer. If no agreement is reached, the employer may act unilaterally; but the union is free to employ its economic weapons. If, on the other hand, a subject is classified as permissive, the employer is free to act without bargaining and, under the *Borg-Warner* dicta, the union is precluded from concerted opposition.⁵²

2. Categorizing Management Decisions which "Necessarily Result" in Termination of Bargaining Unit Jobs: *Fibreboard*

Given the consequences which attach to the mandatory-permissive classification, the approach to making that classification is crucial. Yet *Borg-Warner*, the leading case in the area, cast a dim light on the problem. In that case, the employer had insisted to impasse that it would not sign a collective bargaining agreement unless it contained a clause requiring that in future negotiations the union submit the company's final offer to a secret ballot of all employees in the bargaining unit.⁵³ The Court concluded that this proposal did not directly concern "wages, hours, and other terms and conditions of employment," but rather involved the union's internal decision-making processes.⁵⁴

Borg-Warner taught only the easy lesson that the *process* by which an employer or a union selects its substantive position on a mandatory subject is not itself a mandatory subject of bargaining. Had the Court held otherwise, it would have aided a strong union or employer in crippling the other's independence. It would have undermined the very system of collective bargaining.⁵⁵ Thus, *Borg-Warner* (if it applies to unions) would pro-

135 (1st Cir. 1953) (held improper where the employer did not "make *some* reasonable effort in *some* direction"). Cf. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (Board may not remedy refusal to bargain by requiring agreement even to innocuous clause providing for dues check off).

⁵¹ *NLRB v. Katz*, 369 U.S. 736 (1962) (by implication).

⁵² *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. at 348-49.

⁵³ *Id.* at 345-46.

⁵⁴ *Id.* at 349. *Borg-Warner* was seeking to impose by contract a fundamental change in the nature of the collective bargaining relationship that Congress had specifically rejected. The original Hartley Bill would have required, prior to a strike, "a secret ballot of the employees in the bargaining unit concerned on the question whether such employees desire to reject the employer's last offer of settlement and to strike." H.R. 3020, 80th Cong., 1st Sess., § 2(11)(B)(vi)(e) (1947), reprinted in 1 *NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947*, at 39, 165-66 (1948) [hereinafter cited as *LEG. HIST. LMRA*]. This provision was dropped in conference. H.R. REP. NO. 510, 80th Cong., 1st Sess. 34, 93 CONG. REC. 6361 (1947), reprinted in 1 *LEG. HIST. LMRA* 538.

⁵⁵ Indeed, Professor Cox argued that *Borg-Warner's* proposal should have been treated

scribe a union's insistence that an employer submit plant closing decisions to a majority vote of its stockholders. But it would provide no guidance for determining which *substantive* proposals of an employer or of a union are mandatory issues of bargaining and which are not.

The battle over whether management decisions which lead inevitably to job termination are mandatory has been particularly hard fought. Job security is of vital concern to employees and their representatives.⁵⁶ Good wages and working conditions do not benefit employees who lose their jobs. Indeed, some of the earliest development of labor self-consciousness came when technological development threatened to displace skilled workers and render their craft training useless.⁵⁷ In addition, plant relocation, the runaway shop, has long concerned employees in industries with low capital investment.⁵⁸

Not surprisingly, management has steadfastly resisted any intrusion on its freedom to pursue efficiency (profit).⁵⁹ Many significant management decisions in pursuit of profit or efficiency threaten the job security of some employees. In deciding to produce a new product, an employer may commit capital that it could have invested in maintaining or improving its existing products. In deciding to automate, it may reduce its need for labor or alter its need for certain skills. Whether directly or indirectly, intentionally or inadvertently, a myriad of employer decisions affect bargaining unit jobs.

From its inception, the Board generally found employer decisions affect-

not as permissive, but as "illegal." Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1084-85 (1958); but cf. Van Wezel Stone, *supra* note 28, at 1511 (describing and rejecting the model of "industrial pluralism" which she defines as "the view that collective bargaining is self-government by management and labor: management and labor are considered to be equal parties who jointly determine the conditions of the sale of labor power.")

⁵⁶ Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143, 144 (1968) summarized the labor viewpoint:

[L]abor, through the years, . . . has fought for seniority rights, for the assignment of work to those more appropriately entitled to it, for overtime pay, fringe benefits and the cushioning of serious problems caused by automation and sharp technological changes. Any debilitation in employment security . . . is a clear and present threat to the very essence of trade unionism.

⁵⁷ RAYBACK, *supra* note 4, at 159-60 (machinery and Knights of Labor).

⁵⁸ J. CARPENTER, *supra* note 4, at 547-51. The relationship between low capital investment and the chilling affect of the *First Nat'l Maintenance* rule is discussed *infra* notes 322-28 and accompanying text.

⁵⁹ Platt, *supra* note 56, at 144, framed the management view:

Efficiency . . . is the sole responsibility of management; it has to determine policy in the interest of its business with regard for such factors as the state of the economy, position of the industry, the strategy of competitors; it has to consider the consumers, the government and its own employees; the decision has to be made amidst compromise situations and profitability; it must bear in mind the risk of leakage of information; and perhaps most of all, it is a challenge to managerial competence which, in serious times, may affect the very survival of the company.

ing job security to be mandatory subjects;⁶⁰ but its approach to the problem remained unsettled.⁶¹ The Supreme Court first scrutinized the Board's approach to job security issues in the celebrated case *Fibreboard Paper Products v. NLRB*.⁶² There the union, which for many years had represented a unit composed solely of maintenance employees at the employer's plant, properly notified the employer that it would seek modifications of the existing agreement at its termination. The employer refused to negotiate on the ground that it had already decided, on economic grounds, to discharge all the members of the bargaining unit and to have their work done by employees of a subcontractor. In upholding the Board's finding that an employer's economically motivated decision to subcontract is a mandatory subject, the Court considered four factors: statutory language, statutory purpose, amenability to bargaining, and impact on managerial freedom.⁶³

In *Fibreboard* each factor supported the view that bargaining was man-

⁶⁰ See, e.g., *Hoosier Veneer Co.*, 21 N.L.R.B. 907 (1940), *modified and enforced sub nom.*, *NLRB v. Bachelder*, 120 F.2d 574 (7th Cir. 1941) (duty to bargain over reinstatement of discharged employees); *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946) (subcontracting some bargaining unit work), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

⁶¹ In *Timken*, for example, the Board held that employer subcontracting decisions that affect bargaining unit work are mandatory subjects. *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 518 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947) (cited with approval in *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959)). Fifteen years later, in *Fibreboard Paper Products Corp.*, 130 N.L.R.B. 1558 (1961), the Board found an employer's unilateral subcontracting not mandatory *because the subcontract replaced all employees in the bargaining unit*. The Board explained that the decision was "not concerned with the conditions of employment of employees within an existing bargaining unit; it involves, rather, the question whether the employment relationship still exists". *Id.* at 1561. This distinction would, of course, make the existence of a duty to bargain hinge both on the Board's earlier determination of the bargaining unit and on the breadth of the managerial decision to subcontract.

This seems odd for several reasons. First, the Act authorized the Board to determine the bargaining unit in order "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." NLRA § 9(b), 29 U.S.C. § 159(b) (1976). In construing this mandate, the Board has routinely presumed that employees at a single location of a multi-location employer constitute an appropriate bargaining unit. See, e.g., *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551 (1964), *enforcement denied*, 356 F.2d 895 (7th Cir. 1966) (retail chain); *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629 (1962) (manufacturing); *Metropolitan Life Ins. Co.*, 156 N.L.R.B. 1408 (1966) (life insurance offices); *Wyandotte Savings Bank*, 245 N.L.R.B. 943 (1979) (branch banks). Yet if an employer can avoid its duty to bargain by replacing the whole bargaining unit, then the Board's approval of narrow bargaining units may in the end frustrate the employees' right to bargain.

Second, the Act imposes on employers the duty to bargain, a duty that many would prefer to avoid. But the Board's distinction would place the existence of the duty in the hands of those same employers.

The Board itself soon abandoned this strange criterion. In *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963), it overruled *Fibreboard*. Then, on rehearing, it reversed the decision in *Fibreboard* itself. *Fibreboard Paper Products Corp.*, 138 N.L.R.B. 550 (1962). These shifts, of course, coincided with changes in Board membership which followed the elections first of President Eisenhower and then of President Kennedy. See discussion *infra* notes 375-78 and accompanying text.

⁶² 379 U.S. 203 (1964).

⁶³ *Id.* at 210-16.

datory; therefore, the Court did not expressly indicate how the factors should be treated in a case where they conflict. Nonetheless, what the Court did say suggests the following approach: a managerial decision which "necessarily results" in termination of bargaining unit jobs is subject to mandatory bargaining unless the employer can demonstrate that the decision is of a type not amenable to bargaining or that bargaining itself would have so abridged managerial freedom as to frustrate the purpose of the Act.⁶⁴ The following analysis of the Court's four factors supports and expands this interpretation of the *Fibreboard* decision.

The court concluded that managerial decisions from which "termination of employment . . . necessarily results" fall within the literal scope of section 8(d)'s "terms and conditions of employment."⁶⁵ While the Court did not state the significance of this conclusion,⁶⁶ one may infer that it meant thereby to dispose of the parade of horrors argument, i.e., that if employers were required to bargain over all decisions which might affect job security, management would be crippled.⁶⁷ By distinguishing managerial decisions which necessarily result in job termination from those which only indirectly or potentially affect job security, the Court protected management's core interest and gave fair notice of which decisions were subject to the duty to bargain.⁶⁸

As Learned Hand wrote, "There is no surer way to misread any document than to read it literally."⁶⁹ Accordingly, the Court went on to reason that mandatory bargaining over subcontracting promoted "the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."⁷⁰ Again, the Court failed to spell out the significance of its conclusion. However, one may infer that where the Court

⁶⁴ The Court explicitly limited its holding to "the type of 'contracting out' involved in this case." *Id.* at 215. Its reasoning, however, indicated that other decisions which "necessarily result" in job termination fall, on their face, within the language and purpose of the Act.

⁶⁵ *Id.* at 210 (emphasis added).

⁶⁶ The Court could not have meant that the plain meaning precluded judicial inquiry into legislative purpose, since it went on to discuss the fit between the literal meaning and the purpose of the Act. Cf. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975). But see Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982) (revival of literalism).

⁶⁷ Justice Stewart's concurrence paraded just such horrors: "Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of workers' jobs." 379 U.S. at 223.

⁶⁸ Uncertainty in this area may be particularly devastating to employers. Thus, in *Fibreboard* itself, the remedy for the employer's unilateral subcontracting was an order to rehire with back pay. Rather than risk such a remedy, an employer might bargain on doubtful issues. These uncertainty costs played a large part in the Court's reasoning in *First Nat'l Maintenance*. See *infra* notes 171-72 and accompanying text.

⁶⁹ *Giuseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944), *aff'd sub nom.*, *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945).

⁷⁰ 379 U.S. at 211 (emphasis added).

finds that a particular construction of a statute fits its literal meaning and furthers its fundamental purpose, the Court means to establish a presumption "to guide private behavior and to facilitate the resolution of concrete cases."⁷¹

To show that subcontracting is amenable to bargaining, the Court relied both on industrial practice (many collective bargaining agreements limit subcontracting)⁷² and on the nature of the employer's specific concern (here, the high cost of its maintenance operation).⁷³ When, then, might a management decision not be amenable to bargaining? If neither the cost nor the productivity of labor has any bearing on the employer's decision, then bargaining over the decision itself (as opposed to bargaining over its effects) would be futile. Consider an employer, dependent on its reputation for the marketability of its product, which suffers a sudden, overwhelming blow to that reputation so that its market dries up.⁷⁴ Nothing the union could say would have any relevance to the decision to close. One could argue that good faith bargaining is, in fact, impossible and that requiring the employer to go through the motions of bargaining would not further any statutory purpose.

Finally, the Court tersely noted that, since the work was to be done in the same manner and place with no major shift in capital, decision-bargaining would not "significantly abridge" managerial freedom.⁷⁵ Once more the Court left unspoken the relevance of its finding about managerial freedom. But if an application of a statute fits its terms and actually promotes its fundamental purpose, what judicial inquiry remains?

Three possibilities are apparent. First, the construction might promote one "fundamental" purpose while frustrating another equally or "more fundamental" purpose. Second, it might further the purpose of the statute while frustrating that of another statute. Third, it might be unconstitutional.⁷⁶ Apparently, the Court concluded that none of these possibilities was a problem on the facts of *Fibreboard*. It left open, however, their consideration in other cases involving management decisions which necessitate job termination.

Disturbed by the "radical implications" of the Court's opinion, Justice

⁷¹ 2 P. AREEDA & D. TURNER, ANTITRUST LAW 45 (1978) (referring to antitrust law).

⁷² 379 U.S. at 211-12 & n.7.

⁷³ 379 U.S. at 213-14.

⁷⁴ A dramatic case of this sort occurred as a result of the publicity given to the outbreak of "Legionaire's Disease" among the guests of the Bellevue Stratford Hotel in Philadelphia. Widespread fear destroyed the hotel's business. After a period of extreme financial loss, the hotel closed, without first bargaining with its employees' union. (Materials on file with author.)

⁷⁵ 379 U.S. at 213.

⁷⁶ Justice Stewart's concurrence hinted that he saw constitutional problems with any broader incursion on management prerogatives. 379 U.S. at 226. *Cf. Lochner v. New York*, 198 U.S. 45 (1905) (holding that a state's unreasonable and arbitrary interference with individual's right to contract is unconstitutional).

Stewart attempted to reduce its impact by insisting that the Court had "not decide[d] that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain."⁷⁷ Indeed, he concurred only because he found the case to be an exception to the general rule that "management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from" the area of mandatory bargaining.⁷⁸

Fibreboard was, of course, only the opening foray in the battle to establish the ground rules for bargaining over job termination decisions. It remained to be seen how the Board and the courts would apply the Act to a myriad of managerial decisions which necessarily result in job termination, e.g., decisions to subcontract bargaining unit work to be performed off the premises, to close a single part of a plant, to close one location of a multi-location business, to relocate part of a business, to sell, to automate, and so forth. Before these issues could be addressed, the Supreme Court decided another case which, arguably, has had great importance in determining the duty to bargain over plant closings.

3. Limiting Management's Ultimate Authority to Terminate Employment by Closing Part of Its Business: *Darlington*

Fibreboard concerned only an employer's duty to bargain over job-terminating decisions, not the employer's power to make the ultimate decision to close its facilities. In *Textile Workers Union v. Darlington Manufacturing Co.*,⁷⁹ the Supreme Court considered the limitations placed by section 8(a)(3)⁸⁰ on management's ultimate power to close part or all of its business. It held that while an employer has an absolute right to close its whole business irrespective of motive or effect, it may not close part of its business when both its motive and the foreseeable effect of its action are to chill unionism at its other locations.⁸¹

In *Darlington*, the employer closed its plant immediately after its employees had voted for a union. Had the Court required proof only that the employer intended to punish or to discriminate against the terminated

⁷⁷ 379 U.S. at 218 (Stewart, J., concurring).

⁷⁸ *Id.* at 223 (Stewart, J., concurring). Justice Stewart's disagreement with the majority turned on his reading of statutory purpose. First, he claimed that Congress' specific purpose in § 8(d) was to limit the issues of mandatory bargaining. Second, while he agreed with the majority that industrial peace was a fundamental purpose of the Act, he argued that, since *Borg-Warner* forbids the use of economic weapons over non-mandatory subjects, a narrow construction of mandatory topics would equally serve that purpose. *Id.* at 221 n.6. See discussion *infra* note 163.

⁷⁹ 380 U.S. 263 (1965).

⁸⁰ 29 U.S.C. § 158(a)(3) (1976) which provides that "[i]t shall be an unfair labor practice for an employer . . . by discrimination . . . to encourage or discourage membership in any labor organization"

⁸¹ 380 U.S. at 274-75.

employees, it would have broken no new ground.⁸² But the Court went further by announcing that a partial closing would not violate section 8(a)(3) unless the employer's purpose was to chill unionization at its other locations.⁸³ It explained this novel requirement as necessary "[i]n an area that trenches so closely upon otherwise legitimate employer prerogatives."⁸⁴

4. Reconciling *Fibreboard* and *Darlington*

Although they can easily be distinguished, the tension between *Fibreboard* and *Darlington* portended future conflict. While *Fibreboard* emphasized congressional intent to achieve industrial peace through collective bargaining, *Darlington* read the Act as permitting anti-union plant closings to avoid that same bargaining process, at least where "managerial prerogative" was involved.⁸⁵ The opinions can be reconciled in two ways with very different implications.

First, the cases can be distinguished on the basis of the differing characteristics of sections 8(a)(3) and (5). Section 8(a)(3) limits management's ultimate authority to terminate employment;⁸⁶ section 8(a)(5) requires only that an employer bargain in good faith to impasse before instituting its decisions.⁸⁷ Hence, section 8(a)(3) cuts closer to the "core of entrepreneurial control" than does section 8(a)(5). If section 8(a)(5) does not seriously impair managerial prerogative, then the rationale of *Darlington* would not limit *Fibreboard*.

Alternatively, the cases can be distinguished on their facts. In *Fibreboard* the employer closed only part of its business at the location, though it

⁸² See generally Christensen & Svano, *supra* note 9.

⁸³ In support, the Court cited only one inapposite case. In *Local 357, Int'l Bhd. of Teamsters*, 365 U.S. 667 (1961), the employer, at the instance of the union, fired a union member who had violated a hiring hall agreement. The Court recognized that a hiring hall, or any benefit obtained or service provided by a union, may encourage union membership. But encouragement (or discouragement) is forbidden only if it is prompted by discrimination. The two concurring Justices argued that § 8(a)(3) required an intent to encourage or discourage before the conduct could be found unlawful. Even the concurrence contained no hint that this intent must be to encourage or discourage employees who were not subject to the hiring hall agreement. Thus, neither the majority nor the concurrence supports the proposition that an employer who closes a plant because the immediate employees selected a union is not liable absent proof of intent to chill employees at locations other than the one being closed.

⁸⁴ 380 U.S. at 276.

⁸⁵ The Board had already found that *Darlington* had closed because of the antiunion animus of its president, Roger Milliken. This finding was supported by substantial evidence including campaign threats that he would close if the employees voted for the union. 380 U.S. at 265. Thus had Milliken not left a trail of evidence that he had closed in order to send a message to the employees at other locations, *Darlington* would not have been liable. See *Darlington Mfg. Co.*, 165 N.L.R.B. 1074 (1967), *enforced*, 397 F.2d 760 (4th Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969), discussed *infra* notes 296-97 and accompanying text.

⁸⁶ 29 U.S.C. § 158(a)(3) (1976).

⁸⁷ 29 U.S.C. § 158(a)(5) (1976).

dismissed the entire bargaining unit. It then replaced its former employees with those of a subcontractor. In *Darlington*, on the other hand, the employer totally closed its operations at a discrete location. It did not transfer that work to other employees—or at least there was no evidence that it had made such a transfer.⁸⁸ It can then be argued that the relevant distinction is between decisions affecting working capital, as in *Fibreboard*, and decisions affecting investment capital, as in *Darlington*.⁸⁹ On that theory, the underlying philosophy of *Darlington* would require that there be no duty to bargain over managerial decisions which affect investment capital. This reading would, in effect, limit *Fibreboard* to its facts.

The Board has generally followed the first path by emphasizing the differences between the relevant provisions of the statute; the courts of appeals, the second, stressing differences in the facts. The leading Board decision was *Ozark Trailers, Inc.*⁹⁰ The employer there closed one of its three plants for economic reasons: lack of productivity, poor workmanship, and inefficient plant design. In rejecting the claim that *Darlington* precluded it from imposing a duty to bargain on such facts, the Board said:

We perceive nothing in that portion of the *Darlington* decision dealing with the discriminatory partial closing of a business which suggests the inapplicability of the collective-bargaining requirement of the Act to Respondents' decision to close down the Ozark plant. Indeed, as the *Darlington* decision affirms the propriety of the application of Section 8(a)(3) to a partial closing of a business, it would be anomalous to find that Section 8(a)(5) is without governing authority in such situations.⁹¹

Then, following the reasoning of *Fibreboard*, the Board found that bargaining would promote the statutory purpose because management's decision was rooted, at least in part, in labor costs. The employer had claimed that *Fibreboard* was inapposite because the impact on managerial freedom would be substantially greater in a plant closing case than in a subcontracting case.⁹² The Board, however, answered that the impact on managerial freedom in the two situations was equal—and slight; all that mandatory bargaining requires is "full and frank discussion . . . explor[ing] possible alternatives . . . [following the failure of which] the employer is wholly free to make and effectuate his decision."⁹³ Finally, the Board assessed the impact on managerial freedom as not perceptibly greater than the impact that would flow in any case from mandatory bargaining over the effects of a closing decision: "[T]he effects are so inextricably interwoven with the deci-

⁸⁸ 165 N.L.R.B. 1074.

⁸⁹ Comment, "Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency, 14 U.C.L.A. L. REV. 1089 (1967).

⁹⁰ 161 N.L.R.B. 561 (1966).

⁹¹ *Id.* at 565.

⁹² *Id.* at 568.

⁹³ *Id.*

sion itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a decision which cannot be revised."⁹⁴

As a result, *Ozark* established the Board's view that, as a *general rule*, an employer's interest in managerial autonomy is insufficient to justify a refusal to bargain over plant closing decisions based on those economic considerations which are the ordinary grist of collective bargaining. In succeeding cases the Board considered whether the facts demonstrated nonamenability to bargaining or greater than usual impact on managerial autonomy. The Board consistently found no duty to bargain, whether over subcontracting or plant closing, where the employer's decision clearly rests on economic considerations as to which the cost or quality of labor was irrelevant.⁹⁵

With the change in composition under President Nixon, the Board also exempted decisions to sell part of a business⁹⁶ or to terminate a particular line of business⁹⁷ from mandatory bargaining on the ground that they more deeply involve managerial autonomy than do ordinary closing decisions.⁹⁸ Thus, the Board carved out limited exceptions to (or recognized certain facts as rebutting) the presumption that bargaining over job termination decisions is mandatory.⁹⁹

At first, the courts of appeals almost universally¹⁰⁰ rejected the Board's approach to partial closings.¹⁰¹ Some emphasized a broad reading of *Darlington*, stating that "the finding of lack of antiunion motivation in [a partial] closing . . . for economic reasons precludes a finding of [an] unfair labor

⁹⁴ *Id.* at 570.

⁹⁵ *Sucesion Mario Mercado E Higos*, 161 N.L.R.B. 696 (1966) (subcontracting to avoid food spoilage due to mechanical problems and loss of credit); *Raskin Packing Co.*, 246 N.L.R.B. 78 (1979) (where closing due to loss of credit, no duty to notify union prior to action; duty to bargain does arise if company discusses reopening and union requests bargaining).

⁹⁶ *General Motors Corp.*, 191 N.L.R.B. 951 (1971), *petition for review denied sub nom.*, *UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972). "[D]ecisions . . . in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise" are matters essentially financial and managerial in nature. 191 N.L.R.B. at 952. Members Fanning and Brown, the carryovers, dissented.

⁹⁷ *Summit Tooling Co.*, 195 N.L.R.B. 479 (1972) (Member Fanning dissented).

⁹⁸ The Board majority considered such decisions to be closer to the core of entrepreneurial control, but did not explain how this finding justified its refusal to apply a clear mandate of Congress to cases within the statutory purview. Each of the cases cited *supra* notes 96-97, however, could have been explained on the basis that bargaining would have been futile because labor costs and productivity bore no relationship to the decisions.

⁹⁹ Therefore, John Irving, formerly the NLRB's General Counsel, exaggerated when he wrote: "[T]he Board has consistently held that there is a duty to bargain about [partial closing] decision[s], except in the rarest circumstances." *Supra* note 29, at 220.

¹⁰⁰ However, in an early case the Fifth Circuit agreed with the Board that partial closing decisions were subject to mandatory bargaining. *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir. 1966) (refusing to require bargaining where passage of time had rendered bargaining futile).

¹⁰¹ This repeated refusal of the courts of appeals to enforce Board orders extending *Fibreboard* beyond its facts led to a premature critique of its demise. Rabin, *The Decline and Fall of Fibreboard*, 24 N.Y.U. ANN. CONF. ON LAB. 237 (1972).

practice in refusing to bargain . . . [over] the closing. . . ."¹⁰² Others viewed *Fibreboard* as limited to cases where managerial autonomy is not infringed upon because the employer makes no change in operations, but merely replaces its employees with employees of another employer doing the same work in the same way at the same place.¹⁰³

Not until recently did some circuits take the broader view of *Fibreboard* as establishing a presumptive duty to bargain over job terminating decisions.¹⁰⁴ Given the recurrence and importance of the issue and the conflict among the circuits and between some circuits and the Board, the Supreme Court granted certiorari.

II. *FIRST NATIONAL MAINTENANCE*

In every case before *First National Maintenance* in which the Court had considered an employer's duty to bargain, it had read the statutory phrase "wages, hours, and other terms and conditions of employment"¹⁰⁵ broadly to include all items directly and substantially affecting employee self-interest.¹⁰⁶ Only in section 8(a)(3) cases such as *Darlington* had the Court

¹⁰² *NLRB v. William J. Burns Int'l Detective Agency*, 346 F.2d 897, 902 (8th Cir. 1965) (Justice, then Judge, Blackmun, who wrote the opinion in *First Nat'l Maintenance*, was on the panel). See *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976); *NLRB v. Edward M. Rude Carrier Corp.*, 79 Lab. Cas. (CCH) ¶ 11,615 (reported without opinion, 541 F.2d 277 (4th Cir. 1976)); *NLRB v. Thompson Transp. Co.*, 406 F.2d 698, 703 (10th Cir. 1969). None of these cases considered the differences in policy between §§ 8(a)(3) and (5) or the different consequences incident to violations thereof.

¹⁰³ See, e.g., *NLRB v. International Harvester*, 618 F.2d 85 (9th Cir. 1980); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3rd Cir. 1965).

¹⁰⁴ See, e.g., *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720 (3rd Cir. 1978) (remanding to Board to determine whether, on balance of parties' interests, presumption was overcome); *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596 (2d Cir. 1980) (presumption rebuttable "by showing that purposes of the statute would not be furthered by imposition of a duty to bargain" *id.* at 601), *rev'd*, 452 U.S. 666 (1981).

¹⁰⁵ NLRA § 8(d), 29 U.S.C. § 158(d) (1976).

¹⁰⁶ *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959), exemplifies this construction. *Oliver* involved a collective bargaining provision which set a minimum rental that an owner-driver (one who drives his own trucks for a carrier) must receive from a signatory trucking company. An owner-driver challenged this restriction under state anti-trust law. The Supreme Court found that state law was pre-empted on the ground that rental conditions are a mandatory subject under the NLRA. The Court reasoned that if rental payment failed to cover the owner-driver's costs of ownership, he would have to make up the difference out of his "wages." *Id.* at 294. Thus, the minimum rental provision assured that the owner-driver's net wage would be no less than that of employee-drivers.

But it was not clear that the owner-driver was an "employee" within the coverage of the Act, rather than an "independent contractor." (The definition of "employee" in the NLRA has specifically excluded independent contractors. NLRA § 8(d), 29 U.S.C. § 152(3) (1976).) The Court never squarely faced this question, because another argument rendered it moot. 358 U.S. at 287. The sufficiency of rental income to cover the costs of owner-drivers is a matter "of vital concern to . . . employed drivers." *Id.* at 294. If a carrier could require an owner-driver to rent to it at a loss, it would effectively reduce its labor costs. It would then have an incentive to replace employee-drivers with owner-drivers. Thus, the Court classified the minimum rental provision as mandatory not because of its relatively direct

insulated managerial prerogative. The Court's decision in *First National Maintenance*, however, significantly departed from this consistent and expansive reading of section 8(d). First National Maintenance Corporation (FNM), as was its wont, contracted to provide maintenance service for Greenpark Care Center (Greenpark), a nursing home. FNM agreed to supply labor and supervision and, in return, Greenpark agreed to provide equipment and supplies and to pay FNM's labor costs plus a \$500 per week management fee. Either party could cancel upon thirty days written notice, but Greenpark promised not to hire any FNM employee within ninety days of termination.

Six months after it had entered into this agreement, FNM accepted a cut in its management fee to \$250 per week. Five months later the FNM employees at the Greenpark location chose union representation at a Board-conducted election.¹⁰⁷ Only after the Board had certified the union, did FNM notify Greenpark that it was terminating the contract in thirty days, unless Greenpark restored the original management fee. Greenpark refused.¹⁰⁸

effect on the income of owner-drivers, but because of its indirect effect on the job security of the employee-drivers.

Likewise, in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), the Court defined mandatory topics expansively in terms of the "vital interests" of employees. *Id.* at 692 (White, J., speaking for three members of the Court). Jewel Tea Co. challenged a collective bargaining provision that restricted the hours during which it could operate its self-service meat department as a violation of federal antitrust law. It argued that, while the hours which employees work is a mandatory subject, the hours which the employer chooses to remain open (without using those employees' services) is not. *Id.* at 690. Justice White found the provision valid because night marketing hours could affect the interests even of butchers who worked only in the day. Their workloads might increase. Alternatively, their job security might be impaired because some of their work could be done at night by non-butchers.

Justice Goldberg, also speaking for two of his brethren, rejected even that approach as "a narrow, confining view of what labor unions have a legitimate interest in preserving." *Id.* at 727. He contended that marketing hours would be a mandatory subject even if they had no impact on Jewel Tea's butchers because those hours might affect the working conditions of union butchers at other markets in competition with Jewel. *Id.* at 728.

More recently, in *Fort Motor Co. v. NLRB*, 441 U.S. 488 (1979), the Court affirmed the Board's classification of the prices of in-plant food, supplied by a third party for on-premises consumption by employees, as mandatory. The Court reasoned that conditions of employment must include "matters of deep concern to workers," *id.* at 498 (emphasis added), and that the employees' "unsuccessful boycott" of the food service demonstrated this concern. *Id.* at 501.

Conversely, in *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Court found that benefits of retired employees were not mandatory subjects where they did not vitally affect interests of present employees. Clearly, retired employees, like the (possibly) independent contractors in *Oliver*, are not "employees" within the meaning of the Act. *Id.* at 179. Nonetheless, the Court would have found their benefits mandatory, had it agreed with the Board that these benefits "vitally affect" the benefits of present employees. But the Court found such effects to be "speculative and insubstantial." *Id.* at 180-82.

¹⁰⁷ The union was District 1199, National Union of Hospital and Health Care Employees. The election unit included only those FNM employees who performed maintenance work at the Greenpark location. 452 U.S. at 669.

¹⁰⁸ *Id.* at 669-70.

Thereafter, FNM simply ignored the union's written request to begin collective bargaining. Three days before the contract was set to terminate, FNM first notified its employees—and through them the union—of the closing. The union again demanded that FNM enter into collective bargaining, this time about the decision to terminate its Greenpark operation and its effects on the employees. The union proposed, *inter alia*, that FNM postpone the closing until bargaining could take place.¹⁰⁹

Contending that its decision to terminate was purely economic and that extension of the contract for another thirty days would be "prohibitively expensive," FNM refused to extend the contract or to bargain.¹¹⁰ The union filed charged under sections 8(a)(1) and (5).¹¹¹

The administrative law judge found that the closing was economically motivated.¹¹² Applying settled Board law, he concluded that bargaining was

¹⁰⁹ *Id.*

¹¹⁰ 452 U.S. at 670. FNM's claim that postponing the closing for thirty days was too expensive is curious. Given the firm Board rule that an employer ordinarily had a duty to bargain about such closings, *see supra* text accompanying notes 90-99, the probability that the union would initiate a Board proceeding was very high. The attorney fees alone promised to far exceed the \$1100 (\$250 a week for a month) which FNM insisted would have justified its continuation of the Greenpark contract.

Moreover, had FNM ultimately lost on the merits its back pay liability would have been enormous. By the time the A.L.J. heard the case, approximately one year after the closing, FNM's liability was estimated at \$300,000. Record at 15, *First Nat'l Maintenance*. The potential liability increased as the case wended its way to the Board and the courts. *See Fibreboard*, 379 U.S. at 215-17; F.W. Woolworth, 90 N.L.R.B. 289 (1950).

Assuming, then, that FNM wished to make a rational, *purely economic* decision about whether to bargain over the closing, it would have had to balance the \$1,000 cost of remaining at Greenpark for another month against the potential attorney fees and back pay liability from refusing to bargain. It would have discounted the risk of back pay liability by the probability that the union would file no charge (unlikely), that the General Counsel would issue no complaint (unlikely), that the Board would overrule its settled view or would find that the closing fit one of its exceptions (unlikely), or that the Court of Appeals would deny enforcement (likely), and that the Supreme Court would deny certiorari or disagree with the Board (a crapshoot). But even to avoid liability, FNM was likely to have to spend many thousands of dollars in attorney fees, far more than the probable costs of bargaining.

Therefore, FNM's explanation for its refusal to continue the contract for thirty days strains credulity. If FNM received competent legal counsel and weighed the costs of bargaining against the costs of refusal, its decision to close immediately is inexplicable.

¹¹¹ 452 U.S. at 670. No § 8(a)(3) charge was filed. Response of Samuel M. Kaynard, Regional Director, to a Freedom of Information Act Request (February 4, 1982).

¹¹² FNM offered no objective proof that it was "losing money" on its Greenpark contract. *See* discussion of proof of economic motivation, *infra* notes 288-91 and accompanying text. It did offer unsubstantiated testimony that it had demanded a return to the higher fee and that it was putting money out of its pocket. Record at 29, *First Nat'l Maintenance*. On this basis, the judge found that the "Respondent was losing money on this job." 242 N.L.R.B. 462, 465 (1979). Since under Board law employer motivation was irrelevant in a § 8(a)(5) case, the judge had no reason to devote attention to such a quibble. *See supra* notes 90-99 and accompanying text.

The sequence of events raises a suspicion of anti-union motivation. FNM had accepted the reduction in its fee for the five months prior to the election, apparently without complaining. Record at 29. Even then, FNM waited until the Board certified the union before notifying Greenpark that it was cancelling the contract. Moreover, by refusing to bargain about the decision to close and its effects, FNM saved only \$1,100, while it guaranteed

mandatory. The Board affirmed.¹¹³ Considering the issue for the first time since *Fibreboard*,¹¹⁴ the Second Circuit enforced the Board order on the theory that employer decisions which necessarily lead to job termination are presumed to be mandatory subjects of bargaining and that FNM had not overcome this presumption by proving that bargaining would not have promoted statutory purposes.¹¹⁵

In a Delphic opinion by Justice Blackmun, the Supreme Court reversed.¹¹⁶ The Court summarized the rationale, the range, and the factors for its balancing test in one cryptic passage:

[I]n view of an employer's need for unencumbered decision making [the rationale], bargaining over management decisions that have a substantial impact on the continued availability of employment [the range] should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business [the factors].¹¹⁷

Applying this test to economically motivated partial closing decisions, the Court found that the cost of mandatory bargaining to employer autonomy far exceeded the "incremental benefit" of union participation in the decision-making process.¹¹⁸ Finally, the Court illustrated "the limits of [its] holding" by pointing to facts in the case before it which had played no apparent part in the creation or the application of the test.¹¹⁹

The Court's opinion has mystified its critics. In his dissent Justice Brennan criticized the majority's test as "fail[ing] to consider the legitimate employment interests of the workers"¹²⁰ While agreeing with Justice Brennan that the majority's test "left out the interests of the employees," one commentator argued that "in actually applying the test, the Court [had] effectively balanced the interests of both parties by including employee in-

itself substantial legal fees and risked an enormous back pay award. *See supra* note 110. The record is replete with hints that the Board attorney suspected, but could not prove, antiunion motivation. *See Record* at 15, 16, 36, 44, 63.

¹¹³ 242 N.L.R.B. 462 (1979).

¹¹⁴ In *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), the court found that an employer's transfer of work was not a mandatory subject.

¹¹⁵ *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 601 (2d Cir. 1980).

¹¹⁶ *First Nat'l Maintenance*, 452 U.S. 666 (1981).

¹¹⁷ *Id.* at 679.

¹¹⁸ *Id.* at 686. The Court carefully insisted that its holding on partial closing decisions did not resolve the status of "other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." 452 U.S. at 686 n.22. However, since these decisions clearly fit the class of "management decisions that have a substantial impact on the continued availability of employment," we may expect the Board and the courts of appeals to so confine their consideration. Thus, *First Nat'l Maintenance* would totally replace *Fibreboard*, which spoke to management decisions which "necessarily result" in job termination. *See supra* notes 65-68 and accompanying text.

¹¹⁹ 452 U.S. at 687.

¹²⁰ *Id.* at 688, 689 (Brennan & Marshall, JJ., dissenting). Justice Brennan, joined by Justice Marshall, ignored the majority's argument in favor of its test.

terests in its assessment of the benefits to labor-management relations."¹²¹ The commentator immediately reversed ground, however, by concluding that this "effective balance" was flawed in that it "systematically undervalued employee interests."¹²² Likewise, Professor Gould, in his masterful survey of the Supreme Court's labor decisions in the 1980-81 term, found the opinion "difficult to assess . . . with any precision because so many reasons were given . . . and some of them are in conflict with one another."¹²³ Because the opinion has generated such confusion, a careful explication of the Court's meaning will enhance critical evaluation.

A. *The Asymmetry of the Court's "Balancing" Test*

The Court's test was asymmetrical in two distinct, but related ways. First, the test, as articulated and as applied, counted the burden of mandatory bargaining on management twice. Second, the test, as applied, balanced the incremental benefit for labor against the total burden on management. These asymmetries were consistent in that both discounted employee interests.

1. Double Counting

The test called for a balancing not of employee/union interests against employer interests, but rather of the benefits "for labor-management relations and the collective bargaining process" against the burden on employers.¹²⁴ What the Court meant by the "benefits for labor-management relations" is puzzling. Justice Brennan dismissed the test as considering "only the interests of *management*."¹²⁵ But certainly the interests of employees would be a factor in evaluating the "benefits to labor-management relations."

The question is what, other than the interests of employees, entered into that calculation. The phrase would ordinarily signify a balancing of employee/union interests and management interests. If read this way, the Court's test would then call for balancing the benefits to labor, minus the burden on management, against the burden on management. If this is what the Court meant, then its test "double counted"¹²⁶ the burden on manage-

¹²¹ *The Supreme Court, 1980 Term, supra* note 29, at 332-33 (emphasis added).

¹²² *Id.* at 333.

¹²³ Gould, *supra* note 29, at 10.

¹²⁴ 452 U.S. at 679.

¹²⁵ *Id.* at 689.

¹²⁶ The term is borrowed from cost-benefit analysis in which it refers to the plain error of counting the same benefit or cost twice. E. MISHAN, *COST-BENEFIT ANALYSIS* 78-80 (rev. ed. 1976). Professor Mishan gave the following simple example:

[I]f the construction of a railroad from A to B raises the market value of those houses that are situated near the new railroad station in A, these capital gains are not to be brought separately into the calculation of benefits. The value

ment. Although intuitively this seems implausible, the Court's actual analysis of interests exemplifies double counting.¹²⁷

The Court recognized only two employee/union interests as legitimate: protecting job security (which includes reducing the impact of closings that do occur), and preventing antiunion closings, either total or partial.¹²⁸ In assessing labor's interest in job security, the Court reasoned that there will be no benefit unless the union *persuades* management to remain open by "offer[ing] concessions, information, and alternatives that might be *helpful* to management."¹²⁹ But since the union could do this even if bargaining were merely permissive, "[i]t is unlikely . . . that requiring bargaining over the decision itself . . . will augment this flow of information and suggestions."¹³⁰ By counting as a legitimate benefit only cases in which the union would offer helpful suggestions, the Court discounted those cases in which the union might convince the employer to remain open by the threat or actual use of its economic weapons.

The Court itself, however, has insisted that the use of economic weapons is a legitimate part of the Act's scheme for collective bargaining.¹³¹ The Court's failure to count cases in which the union would succeed in pressuring the employer to remain open as "benefits" of mandatory bargaining therefore can be explained only on the ground that such cases would impermissibly "burden" labor-management relations and the collective bargaining process. But when the Court evaluated management's interests in the final portion of its test, it counted that same "burden" again.¹³²

of such houses rises simply because, once the railroad is built, their occupants have additional advantages either for job opportunities, shopping opportunities, or outings. The estimate of these advantages already have [sic], or should have, been entered into the cost-benefit analysis of the railroad on an annual basis. Therefore to add their capital gains as well would amount to a clear case of double-counting.

Id. at 79.

¹²⁷ The difficulty of moving from an analysis that is theoretically quantifiable (economic costs and benefits) to one that is not (judicial balancing of social interests) is considered *infra* notes 157-60 and accompanying text.

¹²⁸ 452 U.S. at 681-82.

¹²⁹ *Id.* at 681 (emphasis added).

¹³⁰ *Id.*

¹³¹ The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party inclined to agree on one's terms—exist side by side.

NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 489 (1960).

¹³² The Court said: "Labeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner *unrelated to any feasible solution* the union might propose." 452 U.S. at 683 (emphasis added).

This double counting of the burden on management is even clearer in the Court's terse dismissal of the union's interest in preventing antiunion closings. The Court stated that unions have "direct protection against a partial closing decision that is motivated by an intent to harm a union."¹³³ Certainly as to those rare antiunion closings in which the standard of proof established by *Darlington*¹³⁴ can be met, the Court is correct.

Darlington, however, denied that all antiunion closings violate section 8(a)(3). The Court there recognized that the Board had already found, as a fact, that "Darlington had been closed because of . . . anti-union animus. . . ."¹³⁵ Nonetheless, the Court remanded the case to the Board for a finding on whether the closing was "motivated by a purpose to chill unionism in any of the remaining plants of the . . . employer. . . ."¹³⁶ The Court required this extraordinary proof not because the union lacked legitimate interest in preventing antiunion closings absent intent to chill elsewhere, but because the Court wished to protect management "[i]n an area which trenches so closely upon otherwise legitimate employer prerogatives."¹³⁷ As with the union's interest in job security, so too was its interest in "fair treatment" explained away in *First National Maintenance* by weighing the interests of management.¹³⁸ Managerial interests were then double counted by weighing them once again in calculating the burden on management.¹³⁹

2. Balancing Incremental Benefits Against Total Burdens

After balancing the employee interests (minus the employer interests) against the employer interest, the Court "conclude[d] that *the harm* likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons *outweighs the incremental benefit* that might be gained through the union's participation in making [that] decision."¹⁴⁰ By so framing its conclusion, the Court revealed the other asymmetry in its test: it balanced total harm to employers against the incremental benefit for labor-management relations.

The use of the term "incremental" to describe the benefit may seem insignificant. In balancing interests, whether in dollar terms as in economics, or in the less precise terms of the law, one should count as the costs or benefits of a particular decision or rule only such costs or benefits as are

¹³³ *Id.* at 682.

¹³⁴ See *supra* notes 79-84 and *infra* note 297.

¹³⁵ 380 U.S. at 267.

¹³⁶ *Id.* at 275.

¹³⁷ *Id.* at 276.

¹³⁸ 452 U.S. at 682-83.

¹³⁹ In evaluating the burdens on management, the Court said, *inter alia*, "management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies." *Id.*

¹⁴⁰ *Id.* at 686 (emphasis added).

attributable thereto.¹⁴¹ But the term "incremental" was not used to describe the harm to management interests; nor, apparently, was the omission accidental. The Court consistently applied a marginal analysis to the benefits of any union participation in the decision to close, while, just as consistently, it failed to apply a marginal analysis to the harms to management interests.¹⁴²

The Court discounted labor's interest in job security by arguing that it would be protected, in the absence of mandatory decision-bargaining, by mandatory effects-bargaining and by permissive decision-bargaining.¹⁴³ And, of course, the Court found labor's interest in avoiding antiunion closings to be already "protected by section 8(a)(3)."¹⁴⁴ In sum, the Court carefully excluded from its balancing all benefits to labor that it believed would accrue even in the absence of mandatory decision-bargaining. Yet, when the Court considered management's interests, it did not limit itself to burdens that were solely or inherently attributable to mandatory decision-bargaining. Indeed, the *marginal* burden of decision-bargaining is significantly less than the burden counted by the Court.

The Court first pointed to management's need for "speed, flexibility, and secrecy."¹⁴⁵ But if, as the Court insisted, effects-bargaining "must be conducted in a meaningful manner and at a meaningful time,"¹⁴⁶ it is hard to see what incremental harm mandatory decision-bargaining conducted at a meaningful time and in a meaningful manner would cause to these managerial interests.¹⁴⁷ Moreover, management's interest in speed and secrecy could be protected by the application of sanctions for any breach of the union's duty to bargain in good faith.¹⁴⁸

The Court also considered it a burden on management to require bargaining where economic factors other than labor costs compel the closing and render bargaining useless. It ignored the mitigation of this burden under the Board cases which excused management from bargaining where bargaining would be futile.¹⁴⁹

¹⁴¹ What has become axiomatic was at one time revolutionary. See R. COLLISON, BLACK, A. COATS & C. GOODWIN, *THE MARGINAL REVOLUTION IN ECONOMICS: INTERPRETATION AND EVALUATION* (1973); E. KAUDER, *A HISTORY OF MARGINAL UTILITY THEORY* (1965).

¹⁴² This asymmetry has, in part, been noted before. One commentator, for example, stated: "[T]he majority measured the benefit to the union as the incremental benefit from adding mandatory decision-bargaining to mandatory effects-bargaining, but measured the burden on management without considering the burdens already imposed by mandatory effects-bargaining." *The Supreme Court, 1980 Term, supra* note 29, at 333. But what the commentator labelled "[t]his inconsistency," *id.*, the Court applied consistently.

¹⁴³ 452 U.S. at 677 n.15.

¹⁴⁴ *Id.* at 682.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ The Board had made that point long ago. *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 568-70 (1966). See also *infra* notes 343-44 and accompanying text.

¹⁴⁸ Heinsz, *supra* note 29, at 110-11.

¹⁴⁹ See cases cited *supra* note 95. Of course there would still be some burden on manage-

Third, the Court pointed to the heavy burden on management from the union's use of economic weapons to force it to keep a losing operation open.¹⁵⁰ But again, if effects-bargaining is mandatory, it is not clear that the incremental burden of mandatory decision-bargaining would be great. In either case the union could try to pressure management to accept an uneconomic bargain. Indeed, the cost of severance pay or of transfer (including moving expenses) could equal or exceed the losses from remaining open.

Finally, the Court noted that even if an employer believed that it had bargained over the decision to close, it would risk incurring sanctions if the Board later determined that it had not bargained soon enough, long enough (to impasse), or in good faith.¹⁵¹ Those same burdens, however, are incident to effects-bargaining.¹⁵²

Thus, as bizarre as it may seem at first blush, the Court explicitly double counted the burden on management and compared that gross burden to the mere incremental benefit of decision-bargaining for the employees. In sum, the Court's balancing test was not neutral, but rather was heavily weighted in favor of managerial interests. This asymmetry was not, however, a result of carelessness. Rather it was the carefully crafted outcome of an extensive, but oblique, analysis of statutory purpose.

B. Justifying the Asymmetry in Terms of Statutory Purpose

As Professor Charles Fried noted long ago: "The analysis of rights into interests . . . has seemed to offer a liberating technique for looking behind general and perhaps blind concepts . . . to the realities of satisfying the actual wants of actual people."¹⁵³ Certainly the analysis of interests in *First National Maintenance* appears to be liberating when contrasted with the Court's blind obeisance to the "management prerogatives" flag in

ment: e.g., those cases in which the Board fails to recognize that bargaining would, in fact, have been futile. See discussion *infra* note 335 and accompanying text.

¹⁵⁰ 452 U.S. at 682.

¹⁵¹ *Id.* at 685.

¹⁵² Indeed, they are incident to all applications of the requirement of good faith bargaining. If employees strike, an employer is ordinarily entitled to hire permanent replacements. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). If, however, employees strike to protest an employer unfair labor practice, the employer may not permanently replace them. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Such strikers are entitled to back pay from the date they apply for reinstatement. Yet the employer may remain in doubt, and continue to accumulate liability, for years. See, e.g., *NLRB v. General Elec. Co.*, 418 F. 2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

¹⁵³ Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963). See Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943) ("There has been a notable shift throughout the world from thinking of the task of the legal order as one of adjusting the exercise of free wills to one of satisfying wants . . . [W]e must start . . . from a theory of interests . . ."); and Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1030 (1974) ("compromise—the reasoned accommodation of opposed interests—is a central and indispensable technique in . . . judicial resolution.").

Darlington.¹⁵⁴ Indeed, such deference "obscures rather than aids the search for a meaningful limitation on management freedom. . . . [E]ven if one could tell what a management prerogative is, this does not explain why other statutory rights must yield to it."¹⁵⁵

But, as Professor Fried went on to contend, in balancing the interests the Court should not beg the question by identifying elements that will necessarily prejudice the outcome. This would be the situation if the Court "balanced some highly generalized and obviously crucial interest, . . . against some rather particular and narrowly conceived claim."¹⁵⁶

How, then, might one defend the Court against the charge that it merely begged the question? First, one might argue that judicial balancing is merely a metaphor. Since the Court was dealing with legal interests, not with dollars or pounds, the talk of "double counting" and of comparing incremental to total impact is literalistic and misleading. Certainly, no matter how one describes legal interests, the final decision as to "weight" is a matter of subjective judgment, not of objective calibration. Yet the Court took its own metaphor quite seriously; it not only stated the interests, but described the scale on which those interests were balanced. The concepts of double counting and of incremental or marginal analysis merely explain the Court's own purported mode of analysis.¹⁵⁷

Second, if the Court's conceptual scale must be followed, the question is whether the Court was justified in placing its "thumb on the scale of justice."¹⁵⁸ As Professor Barbara Underwood has explained, a host of legal rules affecting the weighing of facts tell the fact-finder not only "how to decide close cases [but also] when to regard a case as close."¹⁵⁹ The requirement in criminal cases that guilt be proven beyond a reasonable doubt "introduces a deliberate imbalance" to carry out the policy judgment "that the costs of an erroneous conviction are far greater than the costs of an erroneous acquittal."¹⁶⁰ This same type of policy judgment was implicit in

¹⁵⁴ In *Darlington* the Court failed to explain how the proximity of "otherwise legitimate employer prerogatives," 380 U.S. at 276 (emphasis added), could justify an almost insurmountable burden of proof protecting those prerogatives at the expense of the very employee interest in self-organization which is the cornerstone of the Act.

¹⁵⁵ Rabin, *Limitations on Employer Independent Action*, 27 VAND. L. REV. 133 (1974). See H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 87 (1968) ("the theory is a modern day rationalization of the views of the judges in the conspiracy cases. As such, it has been rejected by the theories . . . and the policy goals of the Labor-Management Relations Act").

¹⁵⁶ See Fried, *supra* note 153, at 763.

¹⁵⁷ Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). In addition, as Karl Llewellyn stated, the metaphor of interest balancing should not be lightly discarded, for it "forces law on the attention as something man-made, something capable of criticism, of change, of reform . . . not only according to standards found inside law . . . but also according to standards vastly more vital found outside law . . ." *Id.* at 442.

¹⁵⁸ Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1307.

the Court's opinion in *First National Maintenance*. As a result, the Court had to show that the costs of erroneously classifying decision-bargaining as mandatory so exceed the costs of erroneously classifying it as permissive as to justify the "deliberate imbalance" or asymmetry of its test. To do this, the Court turned to statutory purpose.

In *Fibreboard* the Court had also grounded its decision on statutory purpose. After noting that managerial decisions which necessarily result in job termination fall within the plain meaning of the phrase "terms and conditions of employment," the Court had reasoned that, since job security was a matter of vital concern to employees, mandatory bargaining would further "[o]ne of the primary purposes of the Act . . . the peaceful settlement of industrial disputes."¹⁶¹ But *Fibreboard* had hinted that there might be some cases in which the impact of mandatory bargaining on employer autonomy would be so great as to conflict with some other, unnamed statutory purpose.¹⁶²

In *First National Maintenance* the Court built upon this foundation. It did not deny that plant closings fit within the literal terms of the Act. It did not deny that job security is of such vital interest to workers that industrial unrest might result from threats to such security. Instead, it denied that the use of collective bargaining to achieve industrial peace was the *ultimate* purpose of the Act¹⁶³ and suggested that the Act's real purpose is "to preserve the flow of interstate commerce."¹⁶⁴ For the first time the

¹⁶¹ 379 U.S. at 211. The Court refers to this both as "one of the primary purposes" and as "the fundamental purpose." *Id.* Whether the Court meant that industrial peace was the most important of the purposes is unclear.

¹⁶² *Id.* at 213-14.

¹⁶³ Justice Stewart had suggested that line of argument in his *Fibreboard* concurrence: The opinion of the court seems to assume that the only alternative to compulsory collective bargaining is unremitting economic warfare. But to exclude subjects from the ambit of compulsory collective bargaining does not preclude the parties from seeking negotiations about them on a permissive basis. And there are limitations upon the use of economic force to compel concession upon subjects which are only permissively bargainable. *Labor Board v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342.

Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 221 n.6 (Stewart, J., concurring).

This is sheer sophistry. If the Court could secure industrial peace by an ex cathedra declaration that a subject of vital concern to labor is not mandatory, then no subject need be mandatory. It was precisely because the courts had failed to achieve either industrial peace or industrial justice that Congress enacted first the Norris-LaGuardia Act and later the NLRA itself.

Indeed such an argument would have been more difficult after the decision in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), that in-plant food prices were a matter of such vital concern to labor that the Board could classify them as mandatory to prevent "recurring disputes . . . [from] fester[ing] outside the negotiation process until strikes or other forms of economic warfare occur." *Id.* at 499. The Court could hardly have contended that resentment was more likely to fester over minor increases in in-plant food prices than over permanent termination of jobs.

¹⁶⁴ 452 U.S. at 674 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

Court used statutory purpose to confine rather than to expand the employees' voice in decisions directly affecting their vital concerns.¹⁶⁵

To support this use of the Act, the Court argued that Congress empowered the Board, subject to judicial review, to fill in the interstices of the Act so as to promote commerce. When Congress added section 8(d), it authorized the Board to fix the limits of bargaining for that same end. Therefore, the Board must look to the nexus between the subject and the employer-employee relationship. First, if a subject only indirectly affects employees (advertising, pension rights of retirees), there is no duty to bargain. Presumably, to require bargaining over these subjects would injure commerce. Second, if a subject is "almost exclusively" related to the employment relationship (layoffs, work rules), it is automatically mandatory. Third, if a subject "ha[s] a direct impact on employment . . . , but ha[s] as its focus only . . . economic profitability," the determination is more complex; it requires a careful parsing of the statutory schema.¹⁶⁶

The Court's reading of the statutory scheme is at the core of its argument for the asymmetrical balancing test.¹⁶⁷ That reading may be translated

¹⁶⁵ See *supra* note 106 and accompanying text. Cf. *Florida Power & Light Co. v. IBEW*, 417 U.S. 790, 813 n.23 (1974) (dicta) (union strike to require that all foremen be union members would violate § 8 (b)(1)(B), not § 8 (b)(3)).

¹⁶⁶ 452 U.S. at 677. The distinction between categories two and three is baffling. The Court does not explain how it determined that management's focus in decisions on the order of layoffs and on work rules is on the employer-employee relationship, but that its focus in a partial closing is on profits.

When the Court devised its test of bargainability, see *supra* note 117 and accompanying text, it defined the range of application in terms of whether the decision has "a substantial impact on the continued availability of employment." It is not clear whether the Court perceived this range as identical to the category of "profit focused" decisions. If it did, then the distinction between category two and three is merely a variation of the view which the Board expressed in its first *Fibreboard* opinion: a decision to terminate the employment of all employees in a bargaining unit is "not concerned with the conditions of employment of employees within an existing bargaining unit . . . [but] rather . . . [with] whether the employment relationship still exists." 130 N.L.R.B. 1558, 1561 (1961). The deficiencies of this distinction were explained *supra* note 61. Moreover, this distinction was rejected both by the Board in its second *Fibreboard* decision, 138 N.L.R.B. 550 (1962) and by the Supreme Court's affirmance of that decision. 379 U.S. 203 (1964). On the other hand, if the Court meant that an employer has to prove that its decision was based solely on concerns about profitability in order to fall within category three, then the Supreme Court's rule would differ very little from that proposed by the Second Circuit in this very case. See *supra* note 104 and accompanying text.

¹⁶⁷ I have numbered the following crucial propositions to facilitate reference.

[1] The aim of labeling a matter a mandatory subject of bargaining, rather than simply permitting, but not requiring, bargaining, is to "promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace" . . .

[2] The concept of mandatory bargaining is *premised* on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. . . .

as follows. Congress' immediate intent or purpose in requiring collective bargaining was to promote industrial peace. Therefore, matters of vital concern to employees must ordinarily be categorized as mandatory.¹⁶⁸ But Congress' "ulterior purpose"¹⁶⁹ was to promote commerce through "decisions that are better for both management and labor and society as a whole." Although Congress assumed that mandatory bargaining would usually serve that ulterior purpose, it did not intend to extend the mandate where the premise was false.¹⁷⁰

Commerce requires profits, which in turn require decisive employer action. A neutral, case-by-case balancing of interests would "constrain" employers, undermine profits, and hinder commerce.¹⁷¹ Therefore the test of whether a subject is mandatory must be drawn to insulate managerial

[3] This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice....

First Nat'l Maintenance, 452 U.S. at 677-79 (citations omitted) (emphasis added).

¹⁶⁸ *Id.* at 677-78.

¹⁶⁹ R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 89 (1975). Professor Dickerson distinguished "legislative intent" or the immediate objective of a statute from "legislative purpose" or "ulterior purpose." *Id.*

Assuming that the Act's "ulterior purpose" is to promote commerce and that its immediate objective is to achieve industrial peace, and assuming that these aims conflict in relationship to mandatory decision-bargaining, which should control? Professor Dickerson contended:

Much modern writing suggests the former. I suggest, instead, that the latter should normally prevail. For one thing, there is little basis in experience for assuming that a legislative purpose has been precisely and comprehensively articulated. Even if it has, a legislative affirmation of purpose does not guarantee that it has in fact been achieved in the working provisions of the statute; the aspiration may remain at least partly unrealized. Its authors may even have recognized and accepted the fact.

Id. at 98 (citation omitted).

The Court in *First National Maintenance* rejected Dickerson's modest conception of the judicial role. The literature debating the nuances, the significance, and the ascertainability of legislative intent and purpose is vast. See generally Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1980); MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Note, *supra* note 66.

¹⁷⁰ 452 U.S. at 678.

¹⁷¹ Recall that employers faced the possibility of tremendous back pay liability if they guessed wrong as to their duty to bargain over a closing. See *supra* note 110. Although under the Board rule an employer was theoretically free to close in the face of an economic emergency that rendered bargaining futile, it could never be certain whether the Board would so view its circumstances. As a result, a rational employer might hesitate to take decisive action necessary to protect its profitability. Compare Irving, *supra* note 29, at 226, who claims that even after *First Nat'l Maintenance* "[a]s a practical matter ... in all but the clearest closing and sale cases, the employer must engage in decision-bargaining" (citation omitted). Irving was complaining of what he perceived as an overly narrow construction of the decision by the NLRB General Counsel. See *infra* note 387 and accompanying text.

freedom from uncertainty "to the extent essential for the running of a profitable business."¹⁷²

Thus, the Court's test, with its stress on "an employer's need for unencumbered decision-making,"¹⁷³ flows swiftly and logically from its rationale; however, the justification for an asymmetrical balancing test rests on three crucial propositions. First, Congress' ulterior purpose for the Act was to promote commerce. Second, mandatory bargaining over plant closings, and similar decisions, would hinder commerce more than would the industrial unrest that might result from not so requiring. Third, the impact of plant closings on employee free choice is either negligible or irrelevant. The next section will examine the validity of these three propositions which form the foundation of the Court's employer-protective test.

III. CRITIQUE: A FEARFUL ASYMMETRY

The crux of *First National Maintenance*, then, was not in the actual weighing of interests, but in the calibration of the scale to fulfill statutory purpose. The result of the "balancing" was preordained. The Court reasoned that Congress had established the system of collective bargaining for the "ulterior purpose" of promoting commerce. A rule which caused management to hesitate before making economically desirable closing decisions would tend to undermine the profitability necessary to commerce. Therefore, the scale had to be weighted heavily in favor of managerial freedom to make such decisions.

This argument, while superficially persuasive, suffers crucial flaws. First, the NLRA reflects a *congressional* judgment that employee free choice is necessary to long-run economic health. In the reality of labor-management relations, employer decisions concerning job termination can be insulated only at serious risk to employee free choice. Therefore, a construction of the Act which systematically subordinates employee free choice to employer profitability will frustrate the statutory purpose. On the other hand, constructions of the Act which protect employee free choice would injure some employers; but these alternatives would not systematically destroy profitability. Additionally, since Congress specifically delegated to the Board the task of defining the scope of mandatory bargaining, the Court erred in substituting its own judgment for the Board's "reasonably defensible"¹⁷⁴ construction.

¹⁷² 452 U.S. at 678-79.

¹⁷³ [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

452 U.S. at 679 (emphasis added).

¹⁷⁴ *Ford Motor Co., v. NLRB*, 441 U.S. 488, 497 (1979).

A. Congressional Purpose and Statutory Structure

Historical context, statutory language, and some precedent support the Court's inference that promoting commerce was a major aim of the statute.¹⁷⁵ Section one of the Wagner Act recounted Congress' findings that labor unrest, inequality of bargaining power, and lack of associational freedom had obstructed commerce and "aggravate[d] recurrent business depressions."¹⁷⁶ The Taft-Hartley Act added further support. "It is the purpose and policy of this [Act], *in order to promote the full flow of commerce*, to prescribe the legitimate rights of both employees and employers."¹⁷⁷

Moreover, the *First National Maintenance* reading of statutory purpose, if correct, would provide a rationale for two major lines of Supreme Court cases whose basis has until now remained a mystery.¹⁷⁸ In the first line of cases, the Court categorized as "unprotected" employee concerted activities which fall within the plain meaning of section 7, further employee interests, and violate no other legal proscriptions.¹⁷⁹ It has offered no statutory justification for this exclusion. As one noted scholar put it:

The Board and the courts have over time developed a "common law" under section 7. . . . Although the development . . . is not altogether without statutory inspiration, . . . [some] decisions . . . go rather far toward condemning concerted activities as unprotected simply because they are thought to be vaguely "unfair" or to impose "undue" pressures upon the employer. *Exactly, what makes these pressures so, and what gives the Board or the courts authority to declare them unprotected by section 7, is articulated rarely if at all.*¹⁸⁰

*NLRB v. Local 1229, IBEW (Jefferson Standard Broadcasting Co.)*¹⁸¹ exemplifies this first line of cases. Frustrated by drawn out negotiations in which their employer had rejected so basic a union demand as arbitration of individual discharges, unionized employees distributed handbills impugning the quality of the employer's product, which was television programming. Distributing handbills to solicit consumer pressure on an employer clearly fits the requirements for section 7 protection. Furthermore, the handbills were not defamatory or otherwise illegal. Yet the Court

¹⁷⁵ Congress passed the Wagner Act in the midst of the Great Depression. Senator Wagner himself "emphasized . . . that the right of workers to organize . . . was thought necessary as a basis for a sound economy." H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 27 (1950).

¹⁷⁶ Wagner Act, ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1976)).

¹⁷⁷ Labor Management Relations (Taft-Hartley) Act, ch. 120, § 1, 61 Stat. 136, 29 U.S.C. § 141 (1976) (emphasis added).

¹⁷⁸ Barron, *supra* note 14, is the most recent attempt to solve this puzzle. See also Getman, *supra* note 14.

¹⁷⁹ See *infra* text accompanying notes 181-84.

¹⁸⁰ R. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 302 (1976) (emphasis added).

¹⁸¹ 346 U.S. 464 (1953).

both upheld the employer's discharge of the employees and found the employee distribution "unprotected" because it was "disloyal."¹⁸²

The Court did not explain the statutory significance of labeling the acts "disloyal" except to note "the importance of enforcing industrial plant discipline and of maintaining loyalty as well as the rights of concerted activities."¹⁸³ "Plant discipline and . . . loyalty" are, of course, important to the employer, as would be the clearly proscribed power to discharge individual pro-union employees in order to prevent unionization. The question remained: why are they so important to the purposes of the Act as to justify discharging employees who engage in concerted activities in support of collective bargaining demands?

Facing this question squarely, Justice Frankfurter, in dissent, rejected the notion that the decision promoted the statutory purpose:

Section 10(c) does not speak of discharge "for disloyalty". If Congress had so written that section, it would have overturned much of the law that had been developed by the Board and the courts in the twelve years preceding the Taft-Hartley Act. The legislative history makes clear that Congress had no such purpose. . . . Many of the legally recognized tactics and weapons of labor would readily be condemned for "disloyalty" were they employed between man and man in friendly personal relations.¹⁸⁴

In light of *First National Maintenance*, the Court's emphasis on maintaining "discipline and . . . loyalty" can be explained: they are necessary to commerce. The majority in *Jefferson Standard* emphasized that the employees had not disclosed in their handbills that they sought the public's support in a labor dispute with their employer. Hence, if the decision is read to require only disclosure to gain protection, it would not substantially chill employee section 7 activity.

In the second line of cases, the Court recognized, i.e. created, an *implied employer privilege* to respond to employees' protected concerted activity in ways that effectively penalize the employees. This privilege obtains where the employer offers "legitimate and substantial business justifications" and is not (or is not proven to have been) motivated by antiunion animus.¹⁸⁵ Again, the Court has never explained the statutory basis for this doctrine.¹⁸⁶ As another scholar put it in commenting on the first and most

¹⁸² Hence, the discharge was "for cause." See NLRA § 10(c), 29 U.S.C. § 160 (1976).

¹⁸³ 346 U.S. at 474 (emphasis added).

¹⁸⁴ *Id.* at 479-80.

¹⁸⁵ NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967). See generally Barron, *supra* note 14.

¹⁸⁶ The mystery has been not only in the rationale, but also in the approach to these cases. Whether an employer who proves business justification is privileged absent proof of illicit motive or whether employer and employee interests are to be weighed is a question on which the Court has, to put it kindly, wavered. Compare NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (dicta) (privileged); with NLRB v. Erie Resistor Co., 373 U.S. 221 (1963) (weighed); with NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) (weighed or privileged depending on impact on employee rights).

important case in this line: "[N]o one has ever made an effort to justify the underlying legal premise of [the decision] that the employer must be given an opportunity to continue his business even at the expense of his striking employees who are exercising rights guaranteed protection by the statute."¹⁸⁷

The *First National Maintenance* view of statutory purpose can also rationalize the "employer privilege" cases. For example, in *Republic Aviation Corp. v. NLRB*,¹⁸⁸ the Supreme Court in general terms approved the Board's presumptions concerning employer rules limiting employee solicitation of fellow employees at the work place. Under those presumptions, a rule forbidding solicitation during non-working hours is presumed to be an unfair labor practice; but a rule forbidding solicitation during working hours is presumed to be proper.¹⁸⁹ Yet clearly, employee solicitation during working hours is no less an instance, in section 7 terms, of "form[ing], join[ing], or assist[ing]" a union than is solicitation during non-working hours. Although in *Republic Aviation* itself the Court did not articulate a basis for distinguishing these situations, in a later case it explained that "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."¹⁹⁰

Under *First National Maintenance* this implied employer privilege to constrain employee-protected activity can be explained. So long as employees are free to solicit for a union at the job during non-working hours, a neutral worktime prohibition will neither substantially impede efforts to reach fellow employees, nor broadly chill employee free choice. On the other hand, were management forbidden to enforce such a rule, discipline, production, profits, and ultimately commerce might suffer severely.

In sum, historical context, language, and precedent support the view that

¹⁸⁷ Schatski, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 388-89 (1969). Professor Schatski was referring to *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) in which the Court, in dicta, stated that an employer has a right to permanently replace striking employees so long as it does not discriminate against union adherents in deciding who has been replaced. The *Mackay* "rule" has been subject to serious criticism. See, e.g., *id.*; Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630 (1966). Furthermore, it appears to be inconsistent with later Supreme Court decisions. Cf., e.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (grant of superseniority to replacements illegal even if necessary to induce them); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). (Consider the following questions: why is permanent replacement not "inherently destructive"? Why does an employer have a "legitimate and substantial" justification for permanently replacing strikers if temporary replacements are available?) Nonetheless, it remains accepted law.

¹⁸⁸ 324 U.S. 793 (1945).

¹⁸⁹ The continuing "evolution" of the Board's presumptions does not affect this analysis. See, e.g., *Essex Int'l, Inc.*, 211 N.L.R.B. 749 (1974) (work time rule proper); *T.R.W., Inc.*, 257 N.L.R.B. 442 (1981) (work time rule overbroad and improper); *Intermedics, Inc.*, 262 N.L.R.B. No. 178, 110 L.R.R.M. 1441 (1982) (Van de Water and Hunter, JJ., concurring and dissenting).

¹⁹⁰ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (emphasis added).

promoting commerce is *an* important purpose of the Act. Therefore, a construction of the Act which promotes commerce but does not substantially impinge on employee section 7 rights is certainly proper.¹⁹¹ However, a rule which insulates employer autonomy in making economically-motivated plant closing decisions does so at substantial cost to employee free choice.¹⁹² Therefore, the Court had to clear a higher hurdle to justify its test.

To return to Professor Underwood's metaphor of the "thumb on the scale of justice,"¹⁹³ no one would argue that innocents should be convicted of crimes. To justify requiring proof beyond a reasonable doubt in criminal cases, one must find that, under any lesser standard of proof, the risks of wrongful conviction exceed the risks of freeing the guilty. Similarly, to justify protecting employer autonomy (and profit) at the expense of employee free choice, the Court in *First National Maintenance* had to show: (1) that Congress *intended generally* to subordinate employee rights to employer profitability; or (2) that Congress *intended specifically* that sections 8(b)(3) and 8(d) be construed to limit bargaining on matters of vital concern to employees where profitability is at stake; or (3) that the "ulterior purpose" of the Act requires that the systematic risks to employer profitability from mandatory decision-bargaining (an employee-protective test) be weighed against the systematic risks to employee free choice from a rule protecting employer autonomy (an employer-protective test), and that the former outweigh the latter.

The following argument shows that the first and second choices are false and that the third correctly describes the task that the Court should have faced.¹⁹⁴ Section B argues that in reality an employer-protective test poses far greater risks to employee free choice than an employee-protective test poses for employer profitability.

1. Employee Free Choice, Employer Profitability, and the General Intent of Congress

"[E]ven a dog," said Justice Holmes, "distinguishes between being

¹⁹¹ This is the easy case; for it is hard to argue against "[a] change . . . [which] makes at least one person better off and no one worse off." R. POSNER, *THE ECONOMICS OF JUSTICE* 54 (1981). Such a change is called "Pareto superior." But a change is not Pareto superior if it makes anyone worse off, even in a minor way. The change may, nonetheless be "efficient"; i.e., it may "maximiz[e] the total quantity of" satisfaction. B. ACKERMAN, *ECONOMIC FOUNDATION OF PROPERTY LAW* xiii (1975). The rules in *Republic Aviation* and in *Jefferson Standard* are not truly Pareto superior to their contraries (both make employees *somewhat* worse off); but they are very likely more efficient. Efficiency alone, however, does not justify a choice.

¹⁹² See discussion *infra* notes 287-327 and accompanying text.

¹⁹³ *Supra* note 158.

¹⁹⁴ Either the first or second choice, if it were correct, would support the Court's asymmetrical test. The third would replace it with a neutral test that might, nonetheless, justify its specific holding that economically motivated partial closing decisions are not mandatory subjects of bargaining.

stumbled over and being kicked.”¹⁹⁵ Congress clearly meant to “kick” employers, for it protected employee free choice despite the inevitable risk to the profitability of individual employers. Indeed, the Act does nothing if it does not protect employee rights by limiting the pre-existing rights of employers to act unilaterally in pursuit of profit.

The Act expressly protects employee rights to picket, to strike, and to boycott in support of organization, recognition, and collective bargaining.¹⁹⁶ By increasing union bargaining power with respect to wages, working conditions, plant discipline, and a host of other matters, the Act necessarily reduces managerial freedom to make decisions to maximize profitability. As Dean Wellington put it: “[I]f the essence of managerial function is decision-making plain and simple, then management functions are impaired when the scope of collective bargaining is increased. In fact, they are impaired when there is collective bargaining over any subject at all.”¹⁹⁷

Although the decrease in managerial freedom necessarily threatens the profitability of some employers, this is a risk that Congress knowingly and intentionally took. Consider, for example, wage bargaining. Unions have long sought to free wages from the vicissitudes of competition.¹⁹⁸ But industry-wide wage scales inherently threaten the profitability—and hence the survival—of relatively inefficient employers. Yet the Court has recognized the validity of this union objective:

[A] union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. *The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay.*¹⁹⁹

¹⁹⁵ O. HOLMES, *THE COMMON LAW* 7 (1881).

¹⁹⁶ The original Wagner Act, in fact, placed no express limitations on these employee activities. Furthermore, it pre-empted most state regulation thereof. *See e.g.* Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959); UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 258 (1949); Hill v. Florida, 325 U.S. 538 (1945). The relevance of the express limitations on union activities added by Taft-Hartley is discussed *infra* notes 214-48 and accompanying text.

¹⁹⁷ H. WELLINGTON, *supra* note 155, at 87.

¹⁹⁸ *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), in which the union sought to force the employer to accede to the industry-wide pattern to protect its wages and working conditions in relationship to other employers. *See* discussion *infra* notes 230-33 and accompanying text.

¹⁹⁹ United Mine Workers v. Pennington, 381 U.S. 657, 665 n.2 (1965) (emphasis added) (holding that such an objective would nonetheless violate the Sherman Act if promoted by an agreement with some employers aimed at destroying others). The Taft-Hartley Act placed some limitations on the means that unions may use to achieve this objective, but did not make the purpose itself illegal. NLRA §§ 8(b)(4) and (7), 29 U.S.C. §§ 158(b)(4) and (7) (1976). The Board has recognized the propriety of the objective in various circumstances. *See, e.g.*, Teamsters Local 301, 210 N.L.R.B. 783 (1974) (“take it or leave it” bargaining with economically distressed employer); Houston Bldg. Trades Council (Claude Everett Construction Co.), 136 N.L.R.B. 321 (1962) (“area wage standards” picketing). *Cf.* NLRB v. General Elec. Co., 418 F.2d 736, 768-69 (1969) (Friendly, J., dissenting, approved union take it or leave it bargaining in face of employer loss).

More recently, in *NLRB v. International Longshoremen's Association*,²⁰⁰ the Court dealt with a conflict between employee interest in job security and employer interest in profitability. Technological innovation which permitted containerization of cargo in the shipping industry was "substantially more economical than traditional methods,"²⁰¹ at least in part because it reduced work to be performed by longshoremen at shipside. Responding to this threat to its members' jobs, the union bargained for rules which forbade the loading of containers by non-ILA employees of local truckers and freight consolidators. Under the collective bargaining agreement, shipping companies which supplied containers for such use were subject to fines. When some companies were so fined, they refused to continue providing containers for the consolidators.

Although these rules clearly reduced both the profitability of the consolidators and the general efficiency of commerce, the Court found them legal under the Act. It reasoned that "the legality of a thoroughly bargained and apparently reasonable accommodation to technological change . . . [depends] not [on] whether the Rules represent the most rational or efficient response to innovation, but [on] whether they are a legally permissible effort to preserve jobs."²⁰² In so deciding, the Court recognized that agreements to preserve work—which are based on the very employee interest in job security that is involved in decision-bargaining over plant closings—are consistent with the purposes of the Act, even when they lead to clearly inefficient results. Accordingly, the Court has long recognized that Congress did not intend, *as a general rule*, to sacrifice employee section 7 rights whenever their exercise conflicted with individual employer profitability.

2. Sections 8(b)(3) and 8(d) as Specific Limitations

In support of the *First National Maintenance* scale, one might also argue more narrowly that Congress meant the specific proscriptions of section 8(b), the union unfair labor practice provisions, to protect employer interests even at the expense of employee section 7 rights.²⁰³ Section 8(b)(3), of course,

²⁰⁰ 447 U.S. 490 (1980).

²⁰¹ *Id.* at 494. The Court went on to catalogue the efficiencies:

Because cargo does not have to be handled and repacked as it moves from the warehouse by truck to the dock, into the vessel, then from the vessel to the dock and by truck or rail to its destination, the costs of handling are significantly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most significantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship.

Id. at 494-95 (citation omitted).

²⁰² *Id.* at 511.

²⁰³ The Court's argument could be so read. It said: "Despite the deliberate open-endedness

forbids a union "to refuse to bargain collectively." Accepting for the moment that a union's insistence on bargaining over a non-mandatory subject is a constructive refusal to bargain,²⁰⁴ it might then be reasonable to construe the subjects of bargaining under section 8(d) to protect employer profits at the expense of employee free choice. This argument, however, founders in legislative history as well as in precedent.

a. *The Requirement of Specificity.* Congress expected and intended the provisions of section 8(b) to be narrowly construed. In the years preceding the consideration and adoption of the Taft-Hartley Act, the Supreme Court had recognized that employee concerted activities were entitled to some degree of first amendment protection. Hence, it had proclaimed that in order to restrict picketing, there must be a "clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace"²⁰⁵ and the statute must be "narrowly drawn to cover the precise situation giving rise to the danger."²⁰⁶ Congress recognized and adopted the Court's narrow reading of restrictions on peaceful union activity in section 13 of the Taft-Hartley Act: "Nothing . . . [in the NLRA], *except as specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."²⁰⁷

of the statutory language, there is an undeniable *limit* to the subjects about which bargaining must take place . . ." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981). This is considerably toned down from Justice Stewart's rhetoric in his *Fibreboard* concurrence where he wrote: "It is important to note that the words of the statute are *words of limitation*." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. at 220 (Stewart, J., concurring) (emphasis added). The question that neither the *First Nat'l Maintenance* Court nor Justice Stewart in his *Fibreboard* concurrence faced is whether the statutory words were "words of limitation" sufficiently express to meet the specificity requirement of § 13 of the Act.

The provisions of § 8(b) vary greatly. Some clearly were designed to protect employers. See, e.g., NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976) (secondary boycott provision). Others were drafted mainly to protect the employee § 7 right to refrain from concerted activities. See, e.g., NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976) (coercion provision). Still others were aimed to protect either employees or employers or both from union over-reaching. See, e.g., NLRA §§ 8(b)(4)(C) and 8(b)(7)(A), (B) & (C), 29 U.S.C. §§ 158(b)(4)(C) and 158(b)(7)(A), (B) & (C) (1976) (the organizational, recognitional picketing provisions).

²⁰⁴ This proposition has been accepted as if it had been decided since *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342 (1958), where it was never so stated by the majority, but was hinted by the dissent to be a necessary consequence of the majority's holding that employer insistence was a constructive refusal to bargain. *Id.* at 359 (Harlan, J., dissenting). See discussion *infra* notes 214-18 and accompanying text.

²⁰⁵ *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940).

²⁰⁶ *Id.*; see also *Carpenters Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942); *Bakery Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942).

²⁰⁷ 29 U.S.C. § 163 (1976) (emphasis added). *Thornhill*, *supra* note 205, and *Ritters Cafe*, *supra* note 206, are among the cases explicitly referred to only once in the congressional debates on Taft-Hartley. Remarks of Representative Clifford Case, 93 CONG. REC. A1007 (1947), reprinted in 1 LEG. HIST. LMRA, *supra* note 54, at 580-81. But other allusions thereto are clear.

The Hartley Bill included a much broader proscription on concerted activities than did the final Taft-Hartley Act. See § 12 of the Hartley Bill, H.R. 3020, 80th Cong. 1st Sess.

The Supreme Court, in turn, has followed the command of section 13, even where the arguments for an expansive reading of section 8(b) were far more compelling than they were in *First National Maintenance*. For example, in *NLRB v. Drivers Local No. 639 (Curtis Bros.)*,²⁰⁸ the Court found section 8(b)(1)(A), which prohibits union coercion of employees in the exercise of their section 7 rights, *not sufficiently particular* to proscribe a union's recognitional picketing against an employer whose employees had just voted overwhelmingly against union representation. The employer could not have recognized the union without itself violating either section 8(a)(2) of the Act, which forbids employer "dominat[ion] or interfere[nce]" with a union,²⁰⁹ or section 8(a)(3), which forbids employer "discrimination . . . to encourage . . . [union] membership."²¹⁰ If the picketing were effective, the employer would have been forced to choose between suffering business losses and violating its employees' right to refrain from unionization.

Despite these compelling facts, the Court construed section 13 as "a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike. . . ."²¹¹ The Court went on to say that "[i]n the sensitive area of peaceful picketing Congress has dealt *explicitly with isolated evils* which experience has established flow from such picketing. Therefore, *unless there is the clearest indication in the legislative history* of section 8(b)(1)(A) . . . , we cannot sustain the Board's order here."²¹² The Supreme Court has consistently followed the *Curtis Bros.* approach to the construction of section 8(b).²¹³

(1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 54, at 31. For this the Hartley Bill was criticized as going "far beyond the evils which need remedial action." H.R. 245, 80th Cong., 1st Sess. (1947) (minority report), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 54, at 292, 386.

The House-Senate conference committee rejected § 12 of the Hartley Bill and adopted § 13 in its present form. Reporting these results to the Senate, Senator Taft himself stated: "The conferees rejected the broad prohibition of all kinds of strikes *The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes* In that respect the House accepted entirely the provisions of the Senate bill." 93 CONG. REC. 6445-46, *reprinted in* 2 LEG. HIST. LMRA, *supra* note 54, at 1544 (emphasis added).

²⁰⁸ 362 U.S. 274 (1960).

²⁰⁹ 29 U.S.C. § 158(a)(2) (1976). *See International Ladies Garment Workers' Union v. NLRB (Bernhardt-Altman Texas Corp.)*, 366 U.S. 731 (1961).

²¹⁰ 29 U.S.C. § 158(a)(3) (1976). *See Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

²¹¹ *Curtis Bros.*, 362 U.S. at 282.

²¹² *Id.* at 284 (emphasis added).

The facts of *Curtis Bros.* would now be governed by the more narrowly focused language of § 8(b)(7)(B), which proscribes recognitional picketing for one year after a valid election. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, § 704(c), Pub. L. No. 86-257, 73 Stat. 519, 541 (amending the NLRA) (codified at 29 U.S.C. § 158(b)(7) (1976)). Even that narrow language might fail to reach picketing in support of area standards. *Cf. Houston Bldg. & Constr. Trades Council (Claude Everett Constr. Co.)*, 136 N.L.R.B. 321 (1962) ("area standards" picketing not proscribed under § 8(b)(7)(C)).

²¹³ In *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477 (1960), the Court assumed that a job slowdown to pressure the employer in collective bargaining was *not protected* by § 7. Nonetheless, it refused to affirm the Board's treatment of this as a "constructive refusal to bargain" under § 8(b)(3); the Court explained that "the activities here involved *have never been specifically outlawed* by Congress. . . . [T]he Board needs a more specific

b. *The Taft-Hartley "Limitations."* Neither section 8(b)(3) nor section 8(d) can be understood, in terms of section 13, "as specifically provid[ing] for" the prohibition of strikes or picketing over plant closings. Nor does the legislative history, in the words of *Curtis Bros.*, give "the clearest indication" that Congress so intended. In fact, the statutory language and its legislative history show that Congress considered and rejected both a restrictive view of the proper topics of collective bargaining and a proscription on union bargaining over non-mandatory topics.

The drafters of the original Hartley Bill²¹⁴ were concerned with the "liberties the Board has taken with the term "collective bargaining" due to the absence from the present act of language defining the scope of bargaining."²¹⁵ Hence, the Bill defined "collective bargaining" as

not . . . requiring that either party . . . discuss any subject matter other than the following: (i) . . . wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.²¹⁶

Furthermore, the Bill would have made employee or union use of economic weapons to gain an employer's agreement on any other subject an unfair labor practice.²¹⁷

Had Congress enacted those provisions, the specificity requirement of section 13 would have been met; but it rejected both.²¹⁸ Instead, it defined

charter than § 8(b)(3) before it can add to the Act's prohibitions here." *Id.* at 498-99 (citation omitted) (emphasis added). See also *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672-73 (1951). But cf. *NLRB v. Local Union No. 103*, 434 U.S. 335, 355 (1978) (in light of § 13, dissent argued that § 8(b)(7) was insufficiently particular to outlaw union picketing in support of a lawful prehire agreement).

²¹⁴ H.R. 3020, 80th Cong., 1st Sess. (1947) [hereinafter cited as *Hartley Bill*], reprinted in 1 LEG. HIST. LMRA, *supra* note 54, at 31-98.

²¹⁵ H.R. REP. NO. 245, 80th Cong., 1st Sess. (1947), reprinted in 1 LEG. HIST. LMRA, *supra* note 54, at 313. See *id.* at 310-12.

²¹⁶ *Hartley Bill*, *supra* note 214, § 2(11), reprinted in 1 LEG. HIST. LMRA, *supra* note 54, at 39-40. The *First Nat'l Maintenance* Court referred to this provision, 452 U.S. at 675, n.14, but did not consider its significance in light of § 13 of the Act.

²¹⁷ The Bill specifically forbade any employee or union to call, authorize, engage in, or assist any strike or other concerted interference with an employer's operations, an object of which is to compel the employer to accede to the inclusion in a collective bargaining agreement of any provision which under section . . . 2(11) is not included as a proper subject matter of collective bargaining.

Hartley Bill, *supra* note 214, § 8(b)(3), reprinted in 1 LEG. HIST. LMRA, *supra* note 54, at 52.

²¹⁸ Congress' rejection of these specific provisions of the Hartley Bill demonstrates the error in the *Borg-Warner* dictum, which stated that a union's insistence on a non-mandatory topic violates § 8(b)(3). Because *Borg-Warner* involved insistence by an employer rather than by a union, the Court did not assess the significance of § 13 of the Act, nor of the

the scope of bargaining through use of the phrase, "terms and conditions of employment," language which had historically been used to recognize the *breadth* of labor's legitimate interests. The phrase "terms and conditions of employment" is rooted in the reaction to judicial repression of unionization under both the common law and federal antitrust law.

An example of such repression was the common law "illegal purpose" doctrine which was used to confine the scope of legitimate union interests.²¹⁹ In *Carew v. Rutherford*,²²⁰ a union struck for a "work preservation" objective.²²¹ The Massachusetts Supreme Judicial Court found this tortious, on the ground that the purpose was illegal, despite the vital employee interest.²²² And in *Plant v. Woods*²²³ that same court found illegal a strike threat directed at achieving a union shop, despite the vital employee concern with unified organization and representation.²²⁴

Likewise, the federal courts used the Sherman Antitrust Act²²⁵ to restrict the ambit of union activity.²²⁶ In *Loewe v. Lawlor (The Danbury Hatters' Case)*,²²⁷ the Court held the union's recognitional boycott, designed to achieve industry-wide acceptance of the union scale and working conditions, to be an illegal restraint of trade.²²⁸

Congress first used the phrase "terms and conditions of employment"

legislative rejection of §§ 2(11) and 8(b)(3) of the Hartley Bill, nor of the history of the phrase "terms and conditions of employment." Instead, it casually assumed that since § 8(d)'s definition of "to bargain collectively" applies both to § 8(a)(5) and § 8(b)(3), the same consequences must attach to insistence on a non-mandatory subject whether by an employer or by a union.

Although the Court has never squarely faced this issue, its dictum has become so entrenched that a contrary holding now seems unlikely. See *supra* notes 19 & 49 and accompanying text.

²¹⁹ See C. GREGORY, *supra* note 2, at 53-76.

²²⁰ 106 Mass. 1 (1870).

²²¹ The facts mirror those in *NLRB v. International Longshoremen's Ass'n.*, 447 U.S. 490 (1980), in which the Supreme Court found labor's work preservation objective legal under the NLRA. See discussion, *supra* notes 200-02 and accompanying text.

²²² The Court said: "Every man has a right to determine what branch of business he will pursue And it is no crime for any number of persons, *without an unlawful object in view*, to . . . agree that they will not . . . work under a certain price, or without certain conditions." 106 Mass. at 14 (emphasis added).

²²³ 176 Mass. 492, 57 N.E. 1011 (1900).

²²⁴ Justice Holmes, in a prescient dissent, wrote:

I differ from my Brethren in thinking that the threats [to boycott and to strike] were as lawful for this preliminary purpose [the union shop] as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual

Id. at 505, 57 N.E. at 1016.

²²⁵ 15 U.S.C. §§ 1-7 (1976).

²²⁶ See C. GREGORY, *supra* note 2, at 200-22.

²²⁷ 208 U.S. 274 (1908).

²²⁸ Under the NLRA picketing to encourage a consumer boycott is protected so long as it is limited to the "struck product" which does not comprise the whole business of a secondary employer. *NLRB v. Fruit and Vegetable Packers, Local 760*, 377 U.S. 58 (1964); *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607 (1980).

in attempting to overrule *The Danbury Hatters' Case*. In section 20 of the Clayton Antitrust Act, Congress denied federal courts the power to issue injunctions "in any case between an employer and employees . . . growing out of, a dispute concerning *terms or conditions of employment*."²²⁹ Although Congress clearly had intended the phrase to define the legitimate concerns of unions broadly, the Court read this protection narrowly in *Duplex Printing Press Co. v. Deering*.²³⁰ Like *The Danbury Hatters' Case*, *Duplex* involved a boycott designed to protect the union wage scale from cheap non-union competition. The Court found the boycott unprotected because the "employees" engaged therein were not "employees of the employer" being boycotted.²³¹

In a stinging dissent, Justice Brandeis argued that "the contest . . . involves *vitally the interest* of every person whose co-operation is sought."²³² This was the first judicial hint that the phrase "terms and conditions of employment" should be understood as covering all matters of *vital concern* to employees.²³³

Congress approved Justice Brandeis' view in the Norris-LaGuardia Act.²³⁴ That Act deprived the federal courts of equity jurisdiction in "labor dispute[s]," which it broadly defined in section 13(c) as including "any controversy concerning terms or conditions of employment . . . whether or not the disputants stand in the proximate relation of employer and employee."²³⁵ In the years preceding the adoption of the phrase in section 8(d) of the Taft-Hartley Act, the Court construed section 13(c) of Norris-LaGuardia broadly to protect *all* labor actions to secure employee interests,²³⁶ so long as "the employer-employee relationship was the matrix of the controversy."²³⁷ In fact, the Supreme Court only last term summarized the meaning of those cases: "Our decisions have recognized that the term 'labor dispute' must not be narrowly construed *because the statutory definition itself is extremely broad*"²³⁸

²²⁹ 15 U.S.C. § 20 (1976) (emphasis added).

²³⁰ 254 U.S. 443 (1921).

²³¹ *Duplex* differed from *The Danbury Hatters' Case* in that it involved a boycott by employees rather than by consumers of secondary employers. Such a boycott is now proscribed by the NLRA. See NLRA § 8(b)(4)(B), 29 U.S.C. § 8(b)(4)(B) (1976).

²³² 254 U.S. at 481.

²³³ Although Justice Brandeis used this language specifically in rejecting the common law illegal purpose doctrine, he implied that a similar standard should be employed in construing the protection of § 20 of the Clayton Act. *Id.* at 483-88.

²³⁴ Ch. 90, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1976).

²³⁵ 29 U.S.C. § 113(c) (1976). (Specific reference or context will be used to distinguish § 13(c) of Norris-LaGuardia from § 13 of the NLRA as amended in Taft-Hartley.)

²³⁶ *Lauf v. E.G. Shiner & Co.*, 303 U.S. 323 (1938); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Milk Wagon Drivers' Union, Local 753 v. Lake Valley Farm Prods.*, 311 U.S. 91 (1940); *U.S. v. Hutcheson*, 312 U.S. 219 (1941).

²³⁷ *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 147 (1942). See also *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945).

²³⁸ *Jacksonville Bulk Terminals v. International Longshoremen's Ass'n*, 102 S. Ct. 2673, 2680-81 (1982) (emphasis added).

Subsequent to the enactment of the Norris-LaGuardia Act, the phrase was incorporated in the Wagner Act, both to define labor disputes and to establish the area of exclusive power of the majority union.²³⁹ Nothing in the legislative history of the Wagner Act suggests that Congress intended "terms and conditions of employment" to carry a narrower meaning than it had in Norris-LaGuardia, or that Congress was using the phrase to confine rather than to expand the area of legitimate and (where there is a majority representative) exclusive union concern.

Thus, when Congress replaced the Hartley Bill's narrow list of subjects with the phrase "terms and conditions of employment," it imported a history of broad construction. Indeed, from *Danbury Hatters'* until *First National Maintenance*,²⁴⁰ the Supreme Court had always construed that phrase, whether in section 8(d) of the NLRA²⁴¹ or in section 13(c) of Norris-LaGuardia,²⁴² as extending to all matters which directly and vitally affect or concern employees.²⁴³

Moreover, the Court has long recognized that section 8(d) and section 13(c) are cognates. In *Jewel Tea Co.*²⁴⁴ the Court rejected the union's argument that the determination of whether "marketing hours" is a mandatory subject under section 8(d) is a matter within the "primary jurisdiction" of the Board. It reasoned that the phrase "terms and conditions of employment" means the same thing in section 8(d) and in section 13(c): "[C]ourts are . . . not without experience in classifying subjects. . . . Just such a determination must be frequently made when a court's jurisdiction to issue an injunction affecting a labor dispute is challenged under the Norris-LaGuardia Act."²⁴⁵ In light of *Jewel Tea Co.*, the Court's decision in *First National Maintenance* to limit its discussion of *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*²⁴⁶ to a footnote²⁴⁷ is baffling; for in that case the Court specifically held that the union's threat to strike over the railroad's closing of inefficient stations was a "labor dispute" within the meaning of section 13(c).²⁴⁸

²³⁹ NLRA §§ 2(9) and 9(a), codified at 29 U.S.C. §§ 152(9) and 159(a) (1976).

²⁴⁰ Justice Stewart, in his *Fibreboard* concurrence, attempted to argue that the words of § 8(d) are "words of limitation." 379 U.S. at 220 (Stewart, J., concurring). *First Nat'l Maintenance*, of course, rejected the notion that matters of vital concern to employees are necessarily mandatory where the employer's focus is on profitability. Both opinions ignore the history of § 8(d) as well as the specificity requirement of § 13 of the NLRA.

²⁴¹ See cases cited *supra* note 106.

²⁴² See cases cited *supra* notes 236-38.

²⁴³ *Borg-Warner* is not inconsistent with this. The Court there only recognized that a union's (or, by analogy, an employer's) internal decision-making *processes* were not mandatory. The employer was legitimately concerned with the union's decision to strike, but not with how it made that decision. See *supra* text accompanying note 55.

²⁴⁴ 381 U.S. 676 (1965). See *supra* note 106.

²⁴⁵ *Id.* at 686.

²⁴⁶ 362 U.S. 330 (1960).

²⁴⁷ 452 U.S. at 686 n.23.

²⁴⁸ 362 U.S. at 335. The Court was *technically* correct that *Railroad Telegraphers* "does not require that we find bargaining over this partial closing decision mandatory." *First*

In sum, given the early history of the phrase "terms and conditions of employment," Congress' adoption of it in preference to a specific list of narrow topics, and the Court's consistently broad construction thereof, it would be bizarre to treat it as embodying the kind of specific limitation on employee concerted activities which section 13 of the NLRA requires. Moreover, to argue that treating plant closings as a non-mandatory subject promotes the "ulterior purpose" of the Act, one must take account of Congress' express section 13 limitation on the judicial power to restrict the right to strike or picket.

3. Employee Free Choice, Employer Profitability, and the Ulterior Purpose of the Act

The preceding argument has shown that Congress did not intend to protect an individual employer's profitability whenever it would be put at risk by employees exercising their section 7 rights, nor did it intend to specifically limit the mandatory subjects of bargaining. Yet, interestingly, these conclusions do not disprove the Court's claim in *First National Maintenance* that the ulterior purpose of the Act is to promote commerce. Rather, they suggest that the relationship of the various purposes of the Act are more complex; for the Act embodied Congress' express judgment that in the long run the system of employee free choice is itself necessary to commerce.²⁴⁹

Nat'l Maintenance, 452 U.S. at 686 n.23. The cases are not on all fours. *Railroad Telegraphers* was decided under the Norris-LaGuardia Act, as accommodated with the Railway Labor Act, 45 U.S.C. §§ 151-88 (1976), and the Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976); *First Nat'l Maintenance* involved only the NLRA. Identical language often means different things in different contexts. The problem is that the Court offered no reason, but only its naked conclusion, that partial closings are within "terms or conditions" in § 13(c) of Norris-LaGuardia and not within "terms or conditions" in § 8(d) of the NLRA. 362 U.S. at 337. Legislative history and precedent argue that this is a distinction without significance.

²⁴⁹ Section 1 of the Act states:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife ... which have ... the necessary effect of burdening or obstructing commerce

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151 (1976) (emphasis added).

Cf. *Railroad Telegraphers*, 362 U.S. at 342, where the Court dealt with a similar argument from statutory purpose:

[W]e have taken due account of the railroad's argument that the operation

The Court itself has long recognized that "the removal of . . . obstructions [to self-organization] was the driving force behind enactment of the National Labor Relations Act."²⁵⁰ And, although the protection of employee associational rights was not the impetus for the Taft-Hartley Act, its amendment to the NLRA did not evince a rejection of the congressional judgment as to the function and importance of those rights. Indeed, by specifying the section 8(b) limitations so narrowly and by requiring in section 13 a strict construction of section 8(b), Congress re-affirmed the preferred status of employee free choice within the Act.

Despite the fact that management decisions which lead to loss of employment fall within the plain meaning of section 8(d), it does not follow that congressional purpose will either be promoted by requiring bargaining over managerial job-terminating decisions, or be frustrated by not doing so.²⁵¹ If a construction of the Act which protects employer autonomy (an employer-protective test or rule) would have a relatively slight impact on the system of employee free choice, while a construction that protects employee free choice (an employee-protective test or rule) would systematically impair employer profitability and destroy commerce, then the former construction should be chosen to further the purposes of the Act.²⁵² Unfortunately, the Court in *First National Maintenance* did not weigh these systematic risks *before* it adopted its employer-protective rule.

of unnecessary stations, services, and lines is wasteful and thus runs counter to the congressional policy, expressed in the Interstate Commerce Act, to foster an efficient national railroad system. In . . . the Railway Labor and Norris-LaGuardia Acts, Congress has acted on the assumption that collective bargaining . . . will also foster an efficient national railroad system.

The Court went on to argue that, since Congress knew that collective bargaining would add to labor costs, its notion of "efficiency" must not count increased labor costs as waste. The Court acknowledged that some might view the social judgment that would allow the union to bankrupt the employer as unsound; but it condemned any attempt to narrow the Norris-LaGuardia Act as "beyond the judicial province." *Id.* at 342. *Cf.* the discussion of the reasons favoring judicial deference to the Board, *infra* notes 359-86 and accompanying text. *See also* NLRB v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-58 (1939) ("the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce").

²⁵⁰ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 186 (1941).

²⁵¹ The Statute of Frauds provides an illuminating example. The ulterior purpose of that statute is clearly to prevent frauds. Parliament concluded that requiring written and signed documents would generally promote that purpose. Nonetheless, it has been widely recognized that literal application of the Statute of Frauds will often lead to frauds. As a result, "there is scarcely a group of these oral contracts in which the court has not struggled vigorously to prevent such a result." Radin, *supra* note 169, at 877. *Cf.* Murphy, *supra* note 66.

²⁵² Professor Fried's analysis of interest balancing is particularly useful here. *Supra* note 153. He argued what should be obvious; namely, that the Court should balance interests at the same level of generality. But, he went on, "[t]his obvious requirement does not answer the really difficult question, which is at what level of generality should it consider both claims." *Id.* at 763. Fried proceeded to argue that a "particularistic" test is appropriate to those many decisions which are not meant to establish a general rule of conduct, but that a "systematic" balancing is required for establishing competences. He summarized:

B. Balancing the Risks

If the preceding analysis is correct, the Court erred in establishing its test in *First National Maintenance* without *first* balancing the risks of an employer-protective test to employee interests in free choice and job security against the risks of an employer-protective test to employer profits. Moreover, appropriate deference should have led the Court to respect Congress' finding that the scheme of employee free associational rights is itself crucial to commerce. Hence, unless the systematic risk to employee interests was clearly outweighed by the systematic risk to profitability — and unless those risks were of a sort that Congress could not reasonably have discounted when it enacted the NLRA — the Court should have approved an employer-protective standard. It is to assessment of these risks that we now turn.

1. Risks to Employee Free Choice

a. Preliminary Considerations. Before assessing the impact of an employer-protective test on employee free choice, it is necessary to consider the problems of methodology and of relevance. First, are there reasons to believe that employer conduct significantly affects employee free choice, and if so, are there criteria to distinguish effective from ineffective interference? Second, assuming that effective interference occurs, who are the "employees" whose free choice should count on the scale?

(1) Methodology. It is difficult to evaluate the risks that an employer-protective test would pose for employee free choice in deciding whether to organize or to vote for a union (or to accept a contract offer, or to strike).²⁵³ The Board and the Court have long asserted that employee free choice,

"[A] litigant's reference to freedom of speech . . . is not simply a claim for immediate satisfaction, it is the assertion of an interest which can be understood only as a reference to systematic ways of doing things, to roles, institutions and practices." *Id.* at 769.

Likewise, at the particularistic level the conflict over decision-bargaining concerns merely the jobs of the terminated employees and the profits of the individual employer. But at the systematic level it concerns the system of employee free choice established by the NLRA and the system of commerce which the NLRA was designed to enhance. Thus, the Court should have tested the union and employer competences in terms of the risks of alternative rules. Instead, the Court "prejudiced the decision," *id.* at 763, by balancing the very particular and narrow wants of the immediate employees against the systematic interests of employers generally.

²⁵³ The task depends in large measure on one's philosophical judgments (or assumptions) about freedom and the nature of man. See B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 5 (1977) ("analysts must become philosophers if they wish to remain lawyers"). Ackerman limited his consideration to the implications of utilitarian and Kantian philosophies. Cf. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"* 80 HARV. L. REV. 1165 (1967). Labor law is in desperate need of this type of analysis; unfortunately, it is beyond the scope of this article.

at least on the representational question, is fragile.²⁵⁴ But the famous Getman study²⁵⁵ challenged the empirical basis for that theory.

The Board and the Court have habitually assumed that employees are prey to illicit employer influence. The Board has regularly set aside elections in which the victor has committed unfair labor practices.²⁵⁶ Moreover, the Supreme Court has approved the remedial use of bargaining orders where the Board finds: (a) that a union which at one time had majority support (as demonstrated by signed authorization cards) has lost that support as a result of employer unfair labor practices,²⁵⁷ and (b) that the union authorization cards are "a more reliable test of the employee's desires" than an election.²⁵⁸ The Court has also approved the Board's "laboratory condi-

²⁵⁴ The Court has often, if not consistently, been much more sensitive to and restrictive of employer "interference" with employee free choice in the organizational phase than in the bargaining phase of their relationship. Compare *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) (grant of benefit); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (threat to close); *ILGWU v. NLRB* (Bernhardt-Altmann Texas Corp.), 366 U.S. 731 (1961) (recognition of minority union); with *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952) (insistence on management rights clause on mandatory subjects); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (limiting remedy for bad faith bargaining); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965) (offensive lockout); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (permanent replacement of strikers).

The Court's rationale for distinguishing these phases has been that the Act was designed to assure the right to organize in order to gain equality of bargaining power, but that once a bargaining relationship has been established, the Act requires official neutrality on the outcome. Attempts to fine-tune the relative power of management and labor in actual bargaining risk governmental interference or control over the actual terms of the bargain. The Court articulated this most clearly in *American Shipbuilding* where it said:

Having protected employee organization in countervailance to the employer's bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful measures not avail. Sections 8(a)(1) and [8(a)](3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power.

380 U.S. at 317. Whatever the merits of this argument in ordinary collective bargaining situations, the distinction is hard to understand where an employer's response to a decision to unionize is to close that part of its business.

Since the Court has developed this distinction, the analysis of impact on employee free choice will focus almost entirely on the choice of representation. However, the categorization of partial closing decisions as mandatory or permissive inherently affects the relative bargaining power of the parties on other, clearly mandatory, subjects, such as the effects of a closing. Thus the Court *could not really avoid affecting* the relative bargaining power of the parties; it *could only avoid assessing* the meaning of its decision.

²⁵⁵ J. GETMAN, S. GOLDBERG, & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) [hereinafter cited as J. GETMAN].

²⁵⁶ See, e.g., *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962).

²⁵⁷ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

²⁵⁸ *Id.* at 616. Union authorization cards are not, of course, signed in a private voting booth. Therefore, to conclude that they may represent a truer indicator of employee free choice than did or would a secret ballot, the Court must have assumed that employer conduct not only can "force" an employee to deny his true desire for a union when questioned

tions" doctrine, under which it sets aside elections (in the absence of unfair labor practices) where the victor's "[c]onduct [has] create[d] an atmosphere which renders improbable a free choice."²⁵⁹

Implicit in these decisions is the assumption that voters, being rational, cast their votes to maximize their own satisfaction.²⁶⁰ In an ordinary political contest, voters will not decide to vote for a candidate *because* she promises (or threatens) to use her office to harm them; unless the candidate wins, she will not have the power to carry out her threats.²⁶¹ Suppose, for example, a candidate promises to vote against student loans or social security. Voters who believe that they would benefit from these programs are not likely to vote for the candidate because she has threatened their interests, although they might well vote for her on other grounds.

But a union representation election is different. Employees are, to some degree, "economic[ally] dependen[t]"²⁶² on their employer, whether the union wins or loses the election. Suppose, then, that an employer, by speech or conduct, convinces its employees that, should they choose a union, it will exercise its economic power to punish them or to render unionization futile. In that case employees who would otherwise prefer representation might be "persuaded" that a union would not promote their interests.

The authors of the Getman study eschewed such theorizing. Instead they gathered and evaluated empirical data on the effect of campaign behavior on employee voters.²⁶³ Each employee was interviewed twice. In the first interview, conducted early in the official campaign period, the employees were questioned about their predispositions and attitudes. In the second interview, conducted shortly after the vote, they were asked how they had voted, why they had done so, and what they recalled from the campaign.²⁶⁴

The authors found that, *on average*, eighty-one percent of the employees actually voted as they had been inclined at the time of the initial interview.²⁶⁵ Of the nineteen percent who had switched between the interviews or who

by the employer, but also can overbear his capacity to vote his choice even when the employer cannot observe. Presumably, the employee fear that reaches into the voting booth will not be fear that he/she will be singled out for discriminatory treatment, but that the employer will punish the whole bargaining unit if the union wins. Hence, threats of plant closings seem ideally suited to the *Gissel* theory of employee free choice. See *infra* text accompanying notes 281-327.

²⁵⁹ *General Shoe Corp.*, 77 N.L.R.B. 124, 126-27 (1948). Cf. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 279 (1973) (Board should have set aside election).

²⁶⁰ This is the basic theory of both Utilitarian philosophy and welfare economics.

²⁶¹ Cf. *Gissel Packing Co.*, 395 U.S. at 617-18. This, of course, need not be the case where a candidate has unofficial means of causing the harm. And a winning candidate may use her office to punish those groups that voted for the opposing candidate. But cf. J. GETMAN, *supra* note 255 at 27-28.

²⁶² *Gissel Packing Co.*, 395 U.S. at 617.

²⁶³ Getman did analyze the empirical studies on voter behavior in political contests in arguing that the Board's assumptions are incorrect. See J. GETMAN, *supra* note 255, at 27-32.

²⁶⁴ J. GETMAN, *supra* note 255, at 33-42.

²⁶⁵ *Id.* at 62.

had originally been undecided, the authors claimed that the data did not show them to have been influenced substantially by the campaign, whether legal or illegal.²⁶⁶ On this basis the authors concluded that the assumptions about employee free choice underlying the Board's regulation of campaigns were false.²⁶⁷

The Getman study was pathbreaking and provocative. Indeed, were it persuasive, it would suggest great caution in inferring that plant closings have a substantial impact on employee free choice. But its data do not compel its conclusions about the strength of employee free choice in the face of determined employer opposition.²⁶⁸ In fact, those data can reasonably be read to support, rather than to refute, the Board's fragility theory.

First, the sample was severely skewed. The authors sought "to test the effect of . . . unlawful campaigning."²⁶⁹ Because their resources were limited, they neither chose their sample randomly, nor used a control group.²⁷⁰ Instead, they selected elections in which the employers' known animus to unionization, their prior illegal conduct and their selection of a union-busting law firm showed a "high potential for illegal behavior."²⁷¹

During a period when unions won 49.1% of similar elections nationally,²⁷² the unions won only 25.8% of the campaigns in the Getman study.²⁷³ The probability that such skewed outcomes would occur *by chance* is slight, only about .25% or one in four hundred.²⁷⁴ But if employee free choice were, in fact, fragile, such an outcome, in elections chosen by the Getman criteria, would seem likely. Indeed, one might have predicted that those employees who were particularly susceptible to employer influence would have been swayed by employer antiunion communications which preceded the first interview or by their employer's reputation for animus to unionization.²⁷⁵

The authors do not offer any alternative explanation for why their sample, chosen as it was, should result in a union victory rate only half that in the general group of elections. They did explore the possibility that cam-

²⁶⁶ *Id.* at 109, 129-30.

²⁶⁷ *Id.* at 146-56. The major purpose of the study was to evaluate the costs and benefits of campaign regulation, an interesting inquiry, but one tangential to decision-bargaining.

²⁶⁸ The literature evaluating the Getman study has praised the work as valuable and innovative, but has pointed to serious flaws both in its methodology and its interpretation of results. See, e.g., Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181 (1976); Peck, *Review: NLRB Election Law*, 53 WASH. L. REV. 197, 206-09 (1977). But cf. Shapiro, *Why Do Voters Vote?*, 86 YALE L.J. 1532 (1977); Miller, *The Getman, Goldberg, and Herman Questions*, 28 STAN. L. REV. 1163 (1976).

²⁶⁹ J. GETMAN, *supra* note 255, at 34.

²⁷⁰ See, e.g., Eames, *supra* note 268, at 1182-85; Roomkin, Book Review, 27 CASE W. RES. L. REV. 1056, 1059-60 (1977); Shapiro, *supra* note 268, at 1536.

²⁷¹ J. GETMAN, *supra* note 255, at 34.

²⁷² In the 1973 fiscal year, Unions won 49.1% of 8739 elections in which a single union was on the ballot and 51.1% of all elections. 38 NLRB, ANN. REP. 231-32 (1973). See Roomkin, *supra* note 270, at 1059-60.

²⁷³ J. GETMAN, *supra* note 255, at 33.

²⁷⁴ This probability is easily calculated.

²⁷⁵ The data are too thin to demonstrate this.

paigning before the first interview had influenced employees, but found no difference between elections in which there had been such campaigning and those in which there had not.²⁷⁶ Thus the study neither explains the unusual results, nor disproves the plausible hypothesis that they were caused by long-term employer "communication" of attitude.

Second, had the authors obtained the same results from a representative sample, their data would still have been insufficient to demonstrate that employer antiunion conduct does not significantly affect the election outcome. While on average only nineteen percent of voters switched, more switched to the company side than to the union side.²⁷⁷ Moreover, some employer campaigns were far more successful than average. In the five most successful employer campaigns, the union lost thirty-five percent of its members from the time of card signing to the time of the election, and fifteen percent from the time of initial interview until the time of the election.²⁷⁸ Yet the authors "could find no characteristics" to explain these results.²⁷⁹

Whatever the validity of the Getman study, the Board and the Court have continued to assume that, due to the economic dependence of employees on employers, employee free choice can be illicitly overborne by employer interference. This judgment is consistent with the widely-held view that people make decisions to maximize perceived satisfaction. The Getman study does not refute that view and, in fact, contains some evidence to support it.²⁸⁰

Therefore, the analysis of risk which follows assumes that when an employer engages in severe antiunion conduct, it often does interfere with employee free choice. It distinguishes effective from ineffective interference by considering whether an ordinary employee, seeking to maximize his/her satisfaction, would perceive a plant closing as a punishment for unionization, as a serious threat to punish for unionization in the future, or as a promise to render unionization futile.

(2) Relevance. There are three groups of employees whose response to a plant closing might be relevant: the employees who were terminated ("terminated employees"); other employees of the same employer who become aware of the closing ("the employer's other employees"); and employees of other employers who learn of the closing ("other employers' employees"). Together they constitute the class of "aware employees."

Clearly the impact of a closing on the terminated employees and on the

²⁷⁶ J. GETMAN, *supra* note 255, at 69-70.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 100-101.

²⁷⁹ *Id.* at 101.

²⁸⁰ The continued, and apparently growing, expenditure of corporate funds to engage labor relations consultants and antiunion law firms suggests that employers also have not been persuaded by the Getman results. See Bernstein, *supra* note 20.

employer's other employees is relevant.²⁸¹ The question is whether the effect on other employers' employees must—or even may—be considered.

As we have seen, Congress intended the Norris-LaGuardia Act to erect a firm boundary against federal injunctive interference with employees pursuing their self-interest.²⁸² Therefore, it defined "labor dispute" broadly: "regardless of whether or not the disputants stand in the proximate relation of employer and employee."²⁸³ The NLRA adopted that definition²⁸⁴ and further defined "'employee' . . . [as] not . . . limited to the employees of a particular employer, unless the Act explicitly states otherwise."²⁸⁵ Hence, the effect of employer conduct on employees other than its own should be weighed in evaluating alternative constructions of the Act.²⁸⁶

b. An Employer-Protective Test Inevitably Risks Injuring Employee Rights. Suppose that an employer-protective test could be drawn so that it protected an employer's closing decision if, but only if, the decision were based solely on economic consideration (beyond the control of the employer and the union) and contained no element of antiunion animus. Suppose further that employees were confident of this. Closings protected on this basis would not chill employee free choice. Employees would understand that the employer did not act to punish their union affiliation and could reasonably presume that if the closing had been based on factors within the control of the collective bargaining process, the employer would have bargained.

Such a rule is, however, impossible.²⁸⁷ Each increment of protection for

²⁸¹ In *Darlington* the Court required the Board to find that the employer *intended* to chill its other employees as an element of a partial closing violation under § 8(a)(3). 380 U.S. 263, 275-76. It thereby implied that such chilling is relevant. The Court did not hold that the effect on the terminated employees was irrelevant to the Act, but only that it was insufficient to support a violation of § 8(a)(3) in the partial closing context.

²⁸² See discussion *supra* notes 214-48 and accompanying text.

²⁸³ Norris-LaGuardia Act § 13, 29 U.S.C. § 113 (1976).

²⁸⁴ NLRA § 2(9), 29 U.S.C. § 152 (1976).

²⁸⁵ NLRA § 2(3), 29 U.S.C. § 152(3) (1976).

²⁸⁶ The Supreme Court has itself accepted the principle of considering the risks to the rights of employees of other employers. In *First Nat'l Maintenance*, it considered the risks of an employee-protective rule to the general class of employers, not just to FNM itself. See 452 U.S. at 682-86.

Indeed, the court has gone further by recognizing that an employer may actually commit an unfair labor practice by interfering with the § 7 rights of other employers' employees. *Hudgens v. NLRB*, 424 U.S. 507, 522, and n.11 (1976). The employer there stood to benefit from the interference because he was the landlord of the immediate employer. *Hudgens*, 230 N.L.R.B. 414, 418 (1977) (cited with approval in *Seattle-First Nat'l Bank v. NLRB*, 651 F.2d 1272, 1273 n.2 (9th Cir. 1980)). While there will generally be no immediate benefit to an employer who chills other employers' employees (unless it later attempts to hire them), that would be no reason to exclude those employees' interests in devising criteria for general application. Cf. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 727-28 (Goldberg, J., concurring) (considering the effect of hour regulations at one market on employees of other markets).

²⁸⁷ This is the converse to the Court's argument in *First Nat'l Maintenance* that an employee-protective rule would necessarily chill employer autonomy in making purely economic partial closing decisions. See discussion *supra* notes 117-19 and accompanying text.

employer autonomy is won at inevitable cost to employee free choice. The reasons for this are plain:

(1) Economic and antiunion motivation are not mutually exclusive. An employer may oppose unionization on purely philosophical grounds (opposition to collective relationships), or on psychological ones (resistance to sharing power). But since the collective power of unionized employees is usually perceived as increasing the costs of production, it is economics which generally "engenders employer antipathy toward the union."²⁸⁸

(2) Even if economic and antiunion motivation were conceptually distinct, proving which was the actual motive for a particular closing would be difficult. In individual discharge cases, the Board can use the employer's past practice in similar cases involving no element of antiunion animus as a benchmark for judging whether the employee would have been fired regardless of antiunion motivation.²⁸⁹ Even in this context, however, distinguishing discriminatory from non-discriminatory discharges has proven difficult.²⁹⁰

In the plant closing context, the problem is more acute. Few employers have established a sufficient track record of closing non-unionized locations to provide a standard against which the Board can measure the purity of the claimed economic motivation. Further, the variety and complexity of the data, including changes in the national economy, in the condition of the company, and in managerial philosophies, make comparison more difficult.

(3) Legal proof, even of objective facts, is inherently uncertain. A party bearing the burden of persuasion by a preponderance of the evidence must surely lose some meritorious cases (and win some non-meritorious ones). As the burden increases from a preponderance to clear and convincing proof or even to proof beyond a reasonable doubt, the proportion of meritorious cases which fail also increases.²⁹¹ This cost may be justified on the ground that the social benefit of avoiding plaintiff victories in non-meritorious cases exceeds the cost of the increased failure of meritorious cases. But that does not gainsay the reality of those costs.

Likewise, the more a test protects employer autonomy to make purely economic partial-closing decisions, the greater the risk that meritorious

²⁸⁸ A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 241 (9th ed. 1981).

²⁸⁹ See, e.g., *Harrison Steel Castings Co.*, 262 N.L.R.B. No. 59, 110 L.R.R.M. 11424 (1982) (employee properly discharged for absenteeism where employer had previously discharged other employees in like circumstances.)

²⁹⁰ Compare *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3rd Cir. 1943) (discharge result of pro-union activity); with *Mueller Brass Co., v. NLRB*, 544 F.2d 815 (5th Cir. 1977) (Board finding of improper discharge reversed for lack of evidence). The Board has recently attempted to simplify its approach to mixed motive cases. See *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1612 (1982). Cf. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (employer should have opportunity to prove alternative motives).

²⁹¹ This assumes that the fact-finder takes the burden seriously and that the prosecutor or plaintiff chooses its cases rationally in light of the hurdles it faces, the costs of suit, and the benefits of victory.

claims of antiunion motivation will fail. *First National Maintenance*, for example, is susceptible to various constructions. At one extreme, the burden would be placed on the General Counsel to prove that an employer closed one location for the purpose of chilling unionization at its other locations.²⁹² Alternatively, the General Counsel could be required to prove by a preponderance of the evidence that antiunion animus motivated the decision to close.²⁹³ The burden on the General Counsel could be further reduced by shifting to the employer the task of proving that it would have closed in the absence of unionization, where the General Counsel first has proved that antiunion animus was a factor in the decision.²⁹⁴ Although the precise impact of an employer-protective rule would depend on such incidental determinations, each of these constructions would guarantee a substantial chilling of employee free choice.²⁹⁵

(4) The availability of antiunion counsel to advise employers how to accomplish their aims without leaving a trail of incriminating evidence would make the General Counsel's task tougher. Whatever the moral or professional limitations on such advice,²⁹⁶ its availability is beyond dispute.²⁹⁷

(5) An employer-protective test would require a greater expenditure of the limited resources²⁹⁸ of the Board to protect employee free choice than would an employee-protective test. If it is presumed that an employer has a duty to bargain unless it can prove that it closed due to an economic emergency which would have rendered bargaining futile (an employee-protective test),²⁹⁹ few cases will need to be litigated to protect employee

²⁹² Cf. *Darlington*, 380 U.S. at 275 (partial closing violates NLRA if employer has improper motive and chilling effect foreseeable); *NLRB v. William J. Burns Int'l Detective Agency*, 346 F.2d 897, 902 (8th Cir. 1965) (lack of antiunion motive at one location precludes finding violation at another).

²⁹³ Cf. *NLRB v. Wright Line*, 662 F.2d 899, 904 and n.8 (1st Cir. 1981), *enforcing on other grounds*, 251 N.L.R.B. 1083, (1980), *cert. denied*, 102 S. Ct. 1612 (1982).

²⁹⁴ Cf. *Wright Line*, 251 N.L.R.B. 1083 (1980).

²⁹⁵ These and other ways of interpreting the Court's holding on economically motivated decisions to close will be considered in the conclusion of this article. See *infra* note 387.

²⁹⁶ See Bernstein, *supra* note 20, at 56-62.

²⁹⁷ Bernstein, *supra* note 20, *passim*. Consider, for example, the *Darlington* case. On remand, the Board had to consider whether the plant was closed for the specific purpose of chilling the employer's other employees. The Board found significant evidence of such intent in a mailing to officers at each of the employer's local plants of copies of newspaper and magazine articles which ascribed the closing of the *Darlington* plant to unionization, along with a cover letter calling on the local officers to use this information to get the support of community leaders. *Darlington Mfg. Co.*, 165 N.L.R.B. 1074, 1079-80 (1967). Had the *Darlington* decision preceded this mailing, counsel would surely have advised against it being sent. The objective of the closing would have remained the same; but the evidence would have been suppressed. Cf. N. WILLIAMS, 3 AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER 124 (1975 & Supp. 1982) (making a similar point about the requirements of proof of intent in cases challenging discriminatory zoning).

²⁹⁸ Budget cutbacks in the face of heavy caseloads have contributed to increased delay of Board decisions. See 1981 LAB. REL. Y.B. 168-70, 172-73, 204-06 (1982); 109 LAB. REL. REP. (BNA) 104, 151 (1982); 110 LAB. REL. REP. (BNA) 3-4, 238-39 (1982).

²⁹⁹ See, e.g., the Board decision cited *supra* notes 90-99.

interests and those will generally involve relatively simple issues.³⁰⁰ In *First National Maintenance*, for example, the administrative law judge excluded evidence of antiunion animus and kept to a minimum evidence of economic motivation, apparently because he deemed it irrelevant.³⁰¹

Given the increased burden of an employer-protective test, the General Counsel under such a test would probably decide not to pursue cases which it might otherwise have prosecuted,³⁰² or to settle them on terms less favorable to the employees.³⁰³ This would add to the insulation of employers' decisions and increase the chill on employees.

c. *The Risks are Severe and Widespread.* For the foregoing reasons an employer-protective test would necessarily result in some chilling of the free choice of some employees. The questions remain how severe and widespread the chilling effect would be.

Since the employer conduct on employee free choice is measured by the degree to which the employer communicates its determination to punish unionization or to render it futile, the impact of what employees perceive to be an antiunion closing would be higher than that of any other type of employer antiunion conduct.³⁰⁴ The impact on the terminated employees is clear. They would perceive that the employer punished them for asserting their choice to be represented. Furthermore, they would note the failure of the government to protect them in exercising a right which the government claimed to guarantee. Therefore, their faith in the system of employee free choice might be shattered and their "free choice" in future representation elections diminished.³⁰⁵

³⁰⁰ On the other hand, it is arguable that employers will choose to litigate more cases under an employee-protective test than under an employer-protective test, in order to protect their interests. But the decision whether to litigate to protect employee interests under an employer-protective test will rest with the General Counsel, not with the union. The General Counsel would certainly find it more difficult and more expensive to prove antiunion animus, than to prove that an employer closed without bargaining and, if the employer raised the defense, that no economic emergency sufficient to render bargaining futile had occurred.

³⁰¹ See *infra* note 303. *First Nat'l Maintenance*, 242 N.L.R.B. 462, 464-66 (1979).

³⁰² See, e.g., Advice Memorandum from Harold J. Datz, NLRB Associate General Counsel, Division of Advice, Re: Swift & Co., 108 L.R.R.M. 1071 (1981).

³⁰³ The authority to decide which unfair labor practice charges will be prosecuted rests with the General Counsel. The General Counsel's decision not to file a complaint is, according to received wisdom, unreviewable. See NLRA § 3(d), 29 U.S.C. § 153(d) (1976); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). M. MCCLINTOCK, NLRB GENERAL COUNSEL: UNREVIEWABLE POWER TO ISSUE AN UNFAIR LABOR PRACTICE COMPLAINT (1980). Hence, the employees and the union would not be in a position to decide to attack what they perceived as an antiunion plant closing without the General Counsel's cooperation.

³⁰⁴ Cf. *Memphis v. Greene*, 451 U.S. 100, 138 (1981), where Justice Marshall, in dissent, pointed to "the plain and powerful symbolic message" incident to closing a road used by blacks to drive through a white neighborhood.

³⁰⁵ It would, of course, be simplistic to assume that all such employees would vote against unionization in future elections. Some might become entrenched in their pro-union views while losing faith in the integrity of employers and government. In the long run, this could threaten industrial peace. But others, calculating their own satisfaction, might decide that union representation is a threat to their livelihoods and vote against unions in the future on that basis.

The impact on the employer's other employees is likewise clear. The employer would have conveyed its willingness to sacrifice an ongoing part of its business to punish unionization. Those employees would likely infer that the employer would do the same to them.³⁰⁶

The impact on other employer's employees would depend, in part, on their views of their own employer. Those who believe that their employer is not opposed to unionization or would not sacrifice part of its business to frustrate unionization would not be chilled. But to the extent that they believe their employer would sacrifice a profitable operation to keep a union out and have lost their faith in the federal guarantee of their rights, they would be very chilled indeed.

The severity of chill would vary also with the characteristics and state of unionization of the employer's business. Consider the differences among the following three situations: (1) a total closing of the employer's business; (2) a partial closing of a business which is unionized at all locations; and (3) a partial closing of the only (and newly) unionized location of a multi-location business.

(1) Total Closing. Oddly, a total closing would probably have the least impact on employee free choice. As the Court contended in *Darlington*:

[A] complete liquidation of a business yields no . . . future benefit for the employer, if the termination is bona fide. It may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act. The personal satisfaction that such an employer may derive from standing on his beliefs and the mere possibility that other employers will follow his example are surely too remote to be considered dangers at which the labor statutes were aimed.³⁰⁷

A total antiunion closing would frustrate the free choice of the terminated employees, but it would not likely have much broader impact. By definition that employer would have no other employees. Moreover, employees of other employers would recognize that few employers would be prepared, as a matter of principle, to sacrifice a successful business on the altar of antiunionism.

(2) Partial Closing; All Locations Unionized. A partial closing in a generally unionized, multi-location business presents a more complex problem. First, where the union is strongly entrenched, the employer is unlikely to close a profitable location out of antiunion spite. The union can use its organizational strength at the remaining locations to defend its own and the employees' interests. Indeed, if the employees believe that the employer

³⁰⁶ Even if the location which is closed is at a great distance from those which are not, the employees are likely to hear what happened. The employer can assure that its message gets through without providing proof that it closed *for the purpose* of so communicating. Compare *Darlington*, 165 N.L.R.B. at 1079-80, discussed *supra* note 297 and accompanying text; with *Morrison Cafeterias Consol.*, 177 N.L.R.B. 591 (1969), *enforcement denied on other grounds*, 431 F.2d 254 (8th Cir. 1970).

³⁰⁷ 380 U.S. at 272 (citation omitted).

closed to punish unionization, rather than because of economics, their organizational unity may be strengthened.³⁰⁸

Second, in reaction to an employer-protective rule, a strong union which represents the employees of a highly unionized employer might push at the next round of collective bargaining negotiations for contractual provisions which either require decision-bargaining or, at least, provide substantial protection for terminated employees. Hence, an employer-protective rule would promise to be of decreasing importance in highly unionized industries.

This is not sheer speculation. Even before *First National Maintenance*, major unionized employers had often engaged in bargaining — and made enforceable promises — which recognized and protected their employees' interest in job security. A Department of Labor study, published the month after the Court's decision, found that thirty-six percent of the collective bargaining agreements analyzed "placed *restrictions of some type* on management's right to close or relocate."³⁰⁹ Significantly, those agreements which restricted management covered forty-nine percent of the *employees* in the study.³¹⁰ Although only two percent of the agreements required decision-bargaining over specific closings,³¹¹ thirty-four percent required "advance notice and union participation."³¹² Moreover, thirty-five percent provided for employee transfer³¹³ and fourteen percent for relocation allowances.³¹⁴

Those provisions which do not require bargaining over the substantive decisions to close an individual location build into the employer's decision-making process some of the costs that would otherwise fall on the employees or on their communities. Thus, provisions requiring advance notice and participation, or transfer with relocation allowance, or substantial severance

³⁰⁸ But see Bernstein, *supra* note 20, at 7, on the use of decertification by union-busting firms.

³⁰⁹ BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, BULL. NO. 1425-20, MAJOR COLLECTIVE BARGAINING AGREEMENTS: PLANT MOVEMENT, INTERPLANT TRANSFER AND RELOCATION ALLOWANCES 6 (1981) [hereinafter cited as BLS-81] (emphasis added). The Supreme Court relied on other sources to show that "current labor practice . . . supports the apparent imbalance weighing against mandatory bargaining." 452 U.S. at 684 (citing II COLL. BARGG. NEG. & CONT. (BNA) § 65 at 201-33 (1981)) (providing sample agreements, but no statistics), and BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, BULL. NO. 2065, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS (1978) (a study not specifically directed to plant closing provisions). The Court also cited an earlier Department of Labor study which the 1982 study was intended to replace. BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, BULL. NO. 1425-10, MAJOR COLLECTIVE BARGAINING AGREEMENTS: PLANT MOVEMENT, TRANSFER, AND RELOCATION ALLOWANCES (1969) [hereinafter cited as BLS-69].

³¹⁰ BLS-81, *supra* note 309, at 3.

³¹¹ *Id.* at 8. Ten agreements required union agreement to a closing; two required only good faith bargaining.

³¹² *Id.* at 3.

³¹³ *Id.*

³¹⁴ *Id.* at 83 (225 of 1593 agreements).

pay, will have much the same effect as an employee-protective rule about decision-bargaining. Such provisions will constrain employers to consider not only their own profitability, but also the costs to employees.³¹⁵

Third, the decision in *First National Maintenance* has not reversed this trend of bargaining over an employer's decision to partially close its facilities; indeed, it may have accelerated it. Since the Court established its employer-protective rule, unions have successfully bargained for job security/plant closing provisions in a host of major industries.³¹⁶ Some have even bargained for employee buy-outs of factories which management had decided to close.³¹⁷

Fourth, there is no reason to expect *First National Maintenance* to reduce such bargaining in the future. Bargaining about whether to bargain over hypothetical, future plant closings can be distinguished from bargaining about an imminent decision to close a particular plant.³¹⁸ The Court in *First National Maintenance* itself suggested that unions "may secure in contract

³¹⁵ The Supreme Court recognized this in *Fibreboard*. When it considered the implications of industrial practice for the "amenability" of subcontracting to bargaining, the Court relied on a Bureau of Labor Statistics study which had found that 22% of major collective bargaining agreements "contained some form of a limitation on subcontracting." 379 U.S. at 212 n.7 (emphasis added) (citing Luden, *Subcontracting Clauses in Major Contracts*, 84 MONTHLY LAB. REV. 579, 581 (1961)).

The Court's use of statistics in *First Nat'l Maintenance* was, therefore, strange. The Court contended that "current labor practice . . . supports the apparent imbalance weighing against mandatory bargaining." 452 U.S. at 684. Yet, it relied in part on the old BLS study of plant closing and relocation provisions, which showed that 22% of those agreements contained "limitations." BLS-69, *supra* note 309, at 71. Thus, if the Court meant to use this study to distinguish plant closing (*First Nat'l Maintenance*) from subcontracting (*Fibreboard*) decisions, it chose the wrong figures to compare. Since the new study found that 36% of agreements "limited" plant closings and relocations, BLS-81, *supra* note 309, at 3, the Court appears to be rowing against the strong current of industrial practice.

³¹⁶ The provision vary widely; but all would either prevent or inhibit management decisions to close or to relocate a plant. Armour & Company and Wilson Foods Corp. set the trend for the meatpacking industry. In return for wage concessions from the United Food and Commercial Workers Union, they agreed to halt plant closings for 18 months and to recognize the union at new locations based on card majorities. 1 COLL. BARG'G. NEG. & CONT. (BNA) § 18, at 146-47 (1982). That pattern was soon followed by other major meatpackers. *Id.*

Ford Motor Corporation led the way in the auto industry. Its new contract with the UAW provides for a guaranteed income stream for long-term employees, additional funds for the Supplemental Unemployment Benefits Fund, lifetime employment at several plants, preferential transfer rights, continuation of benefits after layoff, and retraining. 109 LAB. REL. REP. (BNA) 141-43 (1982). General Motors followed. *Id.* at 265. *See also id.* at 289 (UAW with Dana Corp.); *Id.* at 295 (AT&T with CWA); 110 LAB. REL. REP. (BNA) 33-34, 66-67 (B.F. Goodrich Co., Goodyear Tire & Rubber Co., and Firestone Tire & Rubber Co. with URW); *Id.* at 34 (International Harvester Co. and UAW); *Id.* at 178 (General Electric with IUE and UE) (all on file with author).

³¹⁷ Note, *Mandatory Bargaining and the Disposition of Closed Plants*, 95 HARV. L. REV. 1896 & n.2 (1982).

³¹⁸ Management's interest in "speed, flexibility, and secrecy," *First Nat'l Maintenance*, 452 U.S. at 682, does not exist in bargaining ahead over unscheduled plant closings. If a particular employer believes that those interests will be important to it in the future, it can refuse to contract to decision-bargain.

negotiations provisions implementing rights to notice, information, and *fair bargaining*.³¹⁹ And even if an employer-protective rule were meant to exclude "bargaining about whether to bargain" as a mandatory subject in general contract negotiations, it would not be realistically enforceable.³²⁰ In sum, in the highly unionized sectors of the economy an employer-protective rule would be (and *First National Maintenance* was) stillborn.³²¹

(3) Partial Closings; Only Unionized Location. The question of decision-bargaining under an employer-protective rule will, therefore, arise mainly where an employer who is not generally unionized closes its only (or one of its few) unionized locations. Unfortunately, these are the closings most likely to chill the free choice of the terminated employees, of the employer's other employees, and of other employers' employees.

Consider, for example, an employer whose business consists of subcontracting to perform cleaning and maintenance services for other employers. Presumably the purchasers of service want the best service at the least cost. Unionization of any one subcontractor is likely to increase its costs and make its services less desirable. Therefore, a union can succeed in removing wages from competition only by organizing and gaining uniform contracts throughout the market area.

Suppose further that a new, cut-rate non-union competitor enters the market. If the union succeeds in organizing one of the new competitor's

³¹⁹ 452 U.S. at 682 (emphasis added).

³²⁰ See Cox, *supra* note 55, at 1076-77.

³²¹ In the unionized sector, the rule has not done and will not do what the Court wanted; it has not insulated and will not insulate employer autonomy in deciding whether to close a plant. But it may significantly affect the outcome of general collective bargaining. A party to bargaining whose claim the law protects in the absence of agreement otherwise is, as a practical matter, in a position to trade off its right for something of value held by the other party.

Thus, if a union has a statutory right to mandatory decision-bargaining over individual plant-closing decisions, it will not ordinarily trade off wages to get such a right written into the contract. On the other hand, if management has a statutory privilege to close without bargaining, it will agree to limit that privilege only if the union "pays" for it. Cf. Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 971-72 (1979); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (absent transaction costs, liability rule will not affect resource allocation, but will affect relative wealth of those whose interests conflict).

If this is a correct analysis of the significance of *First Nat'l Maintenance* in the unionized sector, then it is clear that the Court has done what it had often castigated the Board for doing; namely, it has "exercise[d] considerable [indirect] influence upon the substantive terms on which the parties contract." NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 490 (1960). See also *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965). These cases are, of course distinguishable from *First Nat'l Maintenance* in that they did not involve determination of whether a subject of bargaining is mandatory. But a party whose right is protected, absent agreement otherwise, has an economic weapon much like the power to institute a slow down in *Insurance Agents'* or the power to lockout in *American Shipbuilding*. Thus, however scope of bargaining cases are decided, they necessarily affect the relative bargaining power of the parties. Cf. R. FISHER & W. URY, GETTING TO YES 101-11 (1981).

locations, the competitor can easily close that location and make an arguable claim of economic motivation. Or it could bargain, make concessions, and then close on the ground that the concessions were costly.³²² The impact of such a closing on the free choice of the discharged employees, of the employer's other employees, and of other employers' employees would be severe.

Employee apprehension would vary inversely with the level of employee skill and the amount of employer capital invested at each location. In *First National Maintenance*, for example, Greenpark provided tools and supplies.³²³ Even if First National Maintenance had used its own tools and supplies, it could have used the same tools on another job.³²⁴ The probability that an employer would close to prevent unionization would increase as the investment or the value of a particular location decreased.

The current organizational drive in the banking industry presents another interesting example.³²⁵ Suppose that employees at a single branch of a multi-branch bank vote for a union. What would prevent the bank from closing that branch, putatively for economic reasons, but actually for the purpose of discouraging unionization of its other locations?³²⁶

The conclusion is ineluctable. A rule which protects employer autonomy to make purely economic plant closing decisions necessarily will insulate most antiunion plant closings. Employees who perceive such closings as antiunion, who see that the terminated employees received no protection under the Act, and who believe that their employer might follow suit, will

³²² The concessions would, of course, increase the employer's labor costs at the unionized location relative to those at its non-union locations. Under existing constructions of the NLRA, the union could respond by engaging in "area standards" picketing at the employer's other locations. See *Houston Bldg. & Constr. Trades Council (Claude Everett Constr. Co.)*, 136 N.L.R.B. 321 (1962) ("area standards" picketing, as distinguished from recognition picketing, not proscribed under § 8(b)(7)(C)); *Local 41, Int'l Hod Carriers (Calumet Contractors Ass'n)*, 133 N.L.R.B. 512 (1961).

³²³ Indeed, the A.L.J. emphasized that "[t]here was no capital involved when it [FNM] decided to terminate the Greenpark job." 242 N.L.R.B. at 466. The Court failed to apprehend the significance of this when it stated:

[W]e do not believe that the absence of "significant investment or withdrawal of capital," . . . is crucial. The decision to halt work at this specific location represented a significant change in petitioner's operations, a change *not unlike* opening a new line of business or going out of business entirely.

452 U.S. at 688 (emphasis added). "Not unlike" perhaps, but also not very like. Cf. Comment, *supra* note 89, at 1107-09 (arguing that decision-bargaining should be required where a decision affects working capital, but not where it affects investment capital).

³²⁴ On this basis, one could argue that *First Nat'l Maintenance* should have been treated as a runaway shop, not as a partial closing. This would have involved inquiring into whether FNM had taken its "managerial experience" from Greenpark and used it at another location.

³²⁵ Wall St. J., Sept. 29, 1981, at 1.

³²⁶ The bank would need to weigh loss of capital and customers at the closed location and harm to its reputation in its market area plus the risk that its closing would be found illegal against the benefits in hindering unionization at its other locations. If *First Nat'l Maintenance* were construed to require proof of intent to chill unionization elsewhere, the risk of sanctions would be slight. See *supra* notes 292-95 and accompanying text.

be substantially chilled when facing a vote on unionization.³²⁷ The frequency of antiunion closings and the degree of chill will be least in highly unionized and capitalized industries. But where the employer is not generally unionized or where a single location involves little capital, the probability of such closings is high and their impact devastating.³²⁸

2. Risks to Employer Profitability

An employee-protective rule would minimize the risks to the system of employee free choice. It would require an employer to bargain, either to agreement or impasse, before deciding to close part of its business. Moreover, it would free employees and their unions to use their full economic power to prevent or to protest a closing which they deemed to be economically unjustified. Without significant detriment to employee free choice, it might permit an employer to defend an unbargained closing on the ground that an economic emergency, beyond the control of either the employer or the union, had compelled the closing and would have rendered bargaining futile.³²⁹

a. The Risks To Some Employers Are Inevitable. Although an employee-protective rule would assure unionized employees that their employer could not avoid both Board sanctions and union self-defense by disguising an anti-union closing in economic garb, it would also guarantee that some employers would be delayed in, and in some cases prevented from, making purely economic plant closing decisions. Indeed, each increment of employee protection would add to the risks to some employers' profitability. The reasons for this generally mirror the reasons that employer protection is gained only at the expense of employee free choice.

First, even if bargaining would not be futile, mandatory bargaining does not guarantee the revival of a failing enterprise. The Act "does not compel either party to agree to a proposal or require the making of a concession."³³⁰ Unions would not be forced to accept changes (in pay, hours, work rules) that are necessary to the employer's profitability. In fact, when an employer requests such givebacks³³¹ from employees at a particular, relatively inefficient plant, the union faces a conflict between its representation of those

³²⁷ If such employees are at an already unionized location of an employer who is not generally unionized, the impact on their bargaining position may also be substantial. *Cf. supra* note 321.

³²⁸ It is also important to note that the immediate impact on employee free choice may bode ill for long-run industrial peace. Congress' judgment that the frustration of employee free choice leads to industrial unrest is, of course, articulated in § 1, of the NLRA, 29 U.S.C. § 151 (1976). *Cf. the cases discussed supra* note 106.

³²⁹ This in substance, was the rule adopted by the Board and approved by the Second Circuit. *See supra* notes 90-99 & 104 and accompanying text.

³³⁰ NLRA § 8(d), 158 U.S.C. § 158(d), (1976).

³³¹ For an early study of this recent development in collective bargaining, *see* Henle, *Reverse Collective Bargaining? A Look at Some Union Concession Situations*, 26 *INDUS. &*

employees and its representation of others in the industry; for unions have long sought to remove wages from competition by establishing industry or area scales.³³² Nor would the employer be obliged to accept what the union, or even an objective outsider, considered a reasonable offer.³³³ Thus, even where good faith bargaining is not theoretically futile, in some cases it will lead merely to costly delay.³³⁴

Second, the party bearing the burden of persuasion will necessarily lose some meritorious cases. As the burden increases, either in terms of degree or issues, the probability of such mistakes increases.³³⁵

Third, proof that an economic emergency rendered bargaining futile would be difficult. No bright line distinguishes an *economic emergency* beyond the control of employer and union from an *economic problem* which an employer or union can solve.

Fourth, if the Board found that the employer had illicitly refused to bargain, its remedies would potentially be quite severe. For example, in *Fibreboard* the Board ordered the employer to rehire the employees whom it had discharged and to give them back pay from the date of the Board's decision to that of reinstatement.³³⁶ Hence, even if an employer believed that bargaining would be futile and even if, in objective reality, this belief were correct, the employer would need to weigh the risk that the Board and courts would "later . . . label its conduct an unfair labor practice."³³⁷ If an employer believed that the cost of these remedies (probability multiplied by the amount) would exceed the savings from a speedy closing, it would delay closing in order to bargain—even in a truly futile case.

Fifth, because the employee-protective rule would require good faith bargaining to agreement or impasse, an employer who actually bargained might still be found liable on the ground that it had failed to meet at reasonable times,³³⁸ refused to divulge sufficiently the basis for its economic claims,³³⁹ engaged in surface bargaining,³⁴⁰ or ceased bargaining before

LAB. REL. REV. 956 (1978). For recent cases involving union concessions in return for job security provisions, see *supra* note 316.

³³² See cases discussed *supra* notes 198-99, 330-33, and accompanying text. Cf. Greenberg, *Deviation From Wage-Fringe Standards*, 21 INDUS. & LAB. REL. REV. 197 (1967-1968).

³³³ H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

³³⁴ This will be true only where the employer is actually losing money at the site, or where it can recoup capital (or expertise) which would immediately be reinvested at a higher return.

³³⁵ See *supra* notes 291-95 and accompanying text.

³³⁶ 138 N.L.R.B. 550 (1962).

³³⁷ *First Nat'l Maintenance*, 452 U.S. at 679.

³³⁸ *Id.* at 685.

³³⁹ See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (good faith bargaining requires disclosure of basis for management's economic claims).

³⁴⁰ *First Nat'l Maintenance*, 452 U.S. at 685. The risk that an employer will believe that it bargained in good faith, only to be found later to have engaged in "surface bargaining" is slight. The only case cited by the Court, *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953), is typical of the surface bargaining

impasse.³⁴¹ As a result, an employer would face uncertainty as to potential liability that would further chill swift action to stem losses.

Sixth, if a union's right to use its economic weapons depended on a finding that a subject is mandatory, the employee-protective rule would free the union to use economic pressure not only to defend itself against anti-union closings, but also to force an employer to keep an unprofitable plant open. If the losses expected to flow from continuing the one location were less than those feared from union pressure, a reasonable employer would decide to maintain an unprofitable operation.³⁴²

Finally, where the only available (or the best) solution to a problem requires "speed, flexibility, and secrecy," mandatory bargaining in itself might prevent implementation of an efficient (loss avoiding or profit promoting) decision.³⁴³ However, while such an injury to management's interests might inhere in an absolute rule mandating bargaining, it is far from clear that the employee-protective rule under consideration would lead to such results.³⁴⁴

b. The Risks to Employers are Neither Systematic Nor Severe. Although an employee-protective rule seems certain to injure the profitability of some individual employers, the question remains how widespread and how probable are the injuries properly attributable to such a rule. Many of the arguments that an employee-protective rule injures profits would be just as true, absent mandatory decision-bargaining, if effects-bargaining were

cases. The court of appeals found there that the employer had failed in his duty "to make some reasonable effort in some direction to compose his differences with the union." *id.* at 135. Moreover, Reed & Prince had a history of strenuous illegal opposition to unionization beginning in 1937. See *NLRB v. Reed & Prince Mfg. Co.*, 196 F.2d 755 (1st Cir. 1952) (summarizing this history).

³⁴¹ Determining when an impasse has been reached justifying the employer in unilaterally instituting its decision to close is difficult. See R. GORMAN, *supra* note 49, at 448-49.

³⁴² See *First Nat'l Maintenance*, 452 U.S. at 683.

³⁴³ *Id.* at 682.

³⁴⁴ The Court cited three cases in support of its concern. *Id.* at n.20. In *International Ass'n of Machinists v. Northeast Airlines*, 473 F.2d 549 (1st Cir. 1972), *cert. denied*, 409 U.S. 845 (1972), the employer had agreed to merge with another airline. The agreement called for consummation *one year later*, after approval by both the CAB and the stockholders of both corporations. During the year between the initial agreement and the intended consummation, the employer refused to bargain about the effects of that merger on the employees. This case hardly supports the proposition that mandatory decision-bargaining would destroy necessary "speed, flexibility, and secrecy."

The two other cases which the Court cited are equally inapt. Both involved cash flow crises, one due to bank cancellation of a line of credit, *Raskin Packing Co.*, 246 N.L.R.B. 78 (1979), the other due to rejection of a loan application, *M & M Transportation Co.*, 239 N.L.R.B. 73 (1978). In both cases the Board found no duty to bargain over the closing, due to the economic emergencies that rendered bargaining futile. Moreover, in *Raskin Packing* the company no sooner had closed than it began to bargain about re-opening or selling the plant to the employees.

In addition, the Court relied on an article, Goetz, *The Duty to Bargain About Changes in Operations*, 1964 DUKE L.J. 1 (1964), which predated both the Supreme Court's decision in *Fibreboard* and the Board decisions excepting cases of economic emergency.

required to precede implementation of the decision.³⁴⁵ Furthermore, the impact is muted by the exception for economic emergency.³⁴⁶

Former Judge Marvin E. Frankel, in an amicus brief in support of First National Maintenance's petition for certiorari submitted on behalf of the Chamber of Commerce, made the boldest claim as to the feared impact of mandatory decision-bargaining:

A vital national economy requires a maximally free flow and effective use of its economic resources. If a healthy state of productivity is to be maintained, business managers must be able to proceed decisively when confronted with the necessity to terminate marginal or uneconomic operations. The need is especially acute in our time, when we are experiencing sharp declines either in the rate of increased productivity or, more alarmingly, in absolute productivity figures. *The decision of the Court of Appeals . . . embodies a rule that will hobble managerial flexibility in allocating both capital and labor. . . .* At a particularly inopportune time in our history, it would tend to rigidify processes in which crisp responsiveness and adaptability are prime requisites.³⁴⁷

But Judge Frankel offered no evidence to support his implicit claim that an employee-protective rule on decision-bargaining would *systematically* undermine profitability—not one case, not one example, not one statistic, not one hypothetical.³⁴⁸

Justice Blackmun echoed Judge Frankel's rhetoric in a statement which, as we have seen, was the fulcrum for the Court's test: "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."³⁴⁹ Like Judge Frankel, he offered no evidence to support his critical implication that an employee-protective rule would so "constrain" management as to destroy profitability.

The question whether unfettered managerial discretion to close a part of a business without decision-bargaining is necessary to a healthy economy is not so easily answered. But a strong argument can be made that such

³⁴⁵ It is hard to calculate the degree to which the risk to employee free choice or to employer profitability should be attributed to the rule on decision-bargaining rather than to the rule on effects-bargaining since the risks vary with alternative formulations of the rules.

³⁴⁶ *First Nat'l Maintenance*, 627 F.2d at 601-02. See also *supra* note 95 and accompanying text.

³⁴⁷ Brief Amicus Curiae of the Chamber of Commerce of the United States (in support of petition for writ of certiorari) at 4-5, *First Nat'l Maintenance v. NLRB*, 452 U.S. 666 (1981).

³⁴⁸ Judge Frankel did cite two law review articles, neither of which supports his extreme claims. The first argued for an accommodation of the interests of labor and management by requiring "[d]ecision-bargaining. . . in all cases where the employer plans to substitute non-unit workers for unit workers." Schwartz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 *FORDHAM L. REV.* 81, 100 (1970). The other is a fascinating but theoretical piece which argued that the interests should be accommodated by requiring bargaining where working capital, but not investment capital, is involved. Comment, *supra* note 89.

³⁴⁹ *First Nat'l Maintenance*, 452 U.S. at 678-79. See discussion, *supra* notes 167-73 and accompanying text.

managerial autonomy is not necessary and may even be self-destructive. An important recent study, for instance, has attributed America's recent economic malaise to management's "analytic detachment" and to its focus on "short-term cost reduction."³⁵⁰ In contrast, constraints imposed on managerial decision-making by labor unions and legislation compel Western European managers to make long-term decisions.³⁵¹ Yet, most of these countries far out-stripped America in growth of productivity during the 1970's.³⁵² Of course, this study does not prove that mandatory decision-bargaining would promote commercial growth. Such a proposition is probably not susceptible to demonstration. Many factors other than plant closing restrictions distinguished the American and Western European economies and societies in the 1970's.³⁵³ But these productivity increases belie the notion that one can assume that mandatory decision-bargaining would hamstring management and destroy profitability. In fact, these countries increased productivity in the face of plant closing restrictions which were far more onerous than would be mandatory decision-bargaining under the NLRA.

There are other reasons to think that decision-bargaining would promote commerce. Productivity depends not only on managerial skill and technical ingenuity, but also on the day-to-day performance of line employees.³⁵⁴ It is at least reasonable to suppose that workers will perform better if they believe that management respects and considers their interests, including their investment of a career in the enterprise.³⁵⁵ On the other hand, to the

³⁵⁰ Hayes & Abernathy, *Managing Our Way to Economic Decline* 58 HARV. BUS. REV. 67, 68 (1980).

³⁵¹ *Id.* Hayes & Abernathy noted that pressures from European labor unions and national governments virtually force them to take a consistently long-term view in decision-making. *German managers, for example, must negotiate major decisions at the plant level with worker-dominated works councils*; in turn, these decisions are subject to review by supervisory boards . . . , half of whose membership is worker elected. Together with strict national legislation, the pervasive influence of labor unions makes it *extremely difficult to change employment levels or production locations*. Not surprisingly, labor costs in Northern Europe have more than doubled in the past decade and are now the highest in the world.

To be successful in this environment of strictly constrained options, European managers feel they must employ a decision-making apparatus that grinds very fine and very deliberately.

Id. at 76.

Similar constraints exist in Sweden, France, Belgium, the Netherlands, Spain, and Italy. See *Labor Relations in Western Europe*, 1980 LAB. REL. Y.B. 87 (1981); UAW, *ECONOMIC DISLOCATION: PLANT CLOSING, PLANT RELOCATIONS, AND PLANT CONVERSION* (1979), reprinted in *Employee Protection and Community Stabilization Act, 1980: Hearings on S. 1609 Before Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 287-334 (1980).

³⁵² Hayes & Abernathy, *supra* note 350, at 67.

³⁵³ See, e.g., Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study From an American Perspective*, 28 AM. J. COMP. L. 367 (1980).

³⁵⁴ W. OUCHI, *THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE* 5 (1981).

³⁵⁵ Whether terror or trust is a better motivator is hotly disputed among legal educators. See Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971).

extent that contemporary American business communicates to its employees that decisions are made solely in light of the bottom line,³⁵⁶ or solely to chill employees in the exercise of protected rights to unionize,³⁵⁷ it does nothing to engender that trust.

In sum, an employee-protective rule is certain to injure some employers on some occasions. But the broad implication that decision-bargaining is inconsistent with "a vital national economy" or with the autonomy "essential for the running of a profitable business" has not been substantiated. Indeed, there are reasons to suspect that mandatory decision-bargaining, in the long run, would promote commercial health.

3. The Balance

In balancing the risks of an employer-protective rule to employee interests against the risks of an employee-protective rule to employer interests, one must not lose sight of the congressional judgment that the system of employee free choice and free association is a prerequisite for commercial health.³⁵⁸ Hence, only if the risk to the system of employee free choice is insubstantial or grossly outweighed by the systematic risk to employer profitability would the employer-protective rule be justified.

As we have seen, an employer-protective rule modeled on a broad reading of the Supreme Court's opinion in *First National Maintenance* presents systematic risks to employee rights. First, that rule invites and rewards the cynical abuse and manipulation of law which unfortunately has characterized the behavior of a substantial minority of employers. Second, it diminishes the relative bargaining power of employees in general in an area of vital interest to both employees and management.

On the other hand, an employee-protective rule would invite unions to use their economic strength to preserve jobs at the expense of profit, even if that harmed the whole enterprise. This risk, however, would be no different in kind from the risks that Congress knowingly took when it adopted the NLRA. The risk would be occasional, rather than systematic. Moreover, the risk to profitability in those cases must be discounted by the benefit to profitability that would accrue from a more mature and respectful relationship between labor and management under the regime of mandatory decision-bargaining.

³⁵⁶ Unfortunately this was precisely the attitude communicated in Judge Frankel's Chamber of Commerce brief. He portrayed plant closings as a mere problem of "managerial flexibility in allocating capital and labor." Brief Amicus Curiae, *supra* note 347, at 5. Perhaps this may be excused given the confines of advocacy, but if it truly represents the view of the Chamber of Commerce, it may reveal more about the cause of America's economic problem than it intended to.

³⁵⁷ *American Nat'l Ins. Co.*, *supra* note 50, at 401-02.

³⁵⁸ See NLRA § 1, 29 U.S.C. § 151 (1976). Cf. *Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330, 342 (1960).

Therefore, it seems clear that on balance, and giving due deference to the legislative judgment inherent in the structure of the Act, an employee-protective rule would better comport with statutory purpose.

C. Deference

Assessing the comparative risks of classifying partial closing decisions either as mandatory or as permissive is difficult. The determination is affected by, and in turn will affect, many aspects of labor-management relations. Yet the Court, which had last considered a reasonably similar problem in 1964 (*Fibreboard*), had to decide *First National Maintenance* as 1 of 138 cases in the 1980 Term.³⁵⁹

The Board, on the other hand, dealt with this and related problems in dozens of cases in that same period.³⁶⁰ It had the opportunity to observe, to reflect, to experiment, and to read the numerous critiques of its doctrine by academics, practitioners, and judges of the courts of appeals. Its

³⁵⁹ *The Supreme Court, 1980 Term, supra* note 29, at 339. Archibald Cox summarized the dilemma which this presents for the Court.

One of the misfortunes of the Supreme Court is the fragmentary view which it receives of highly specialized and complex fields of law. The cases which reach the court are largely a matter of happenstance . . . The issues in important cases would merit weeks of study to thrash out all their implications.

Supra, note 55 at 1057.

³⁶⁰ In 1979 (the year that the Board decided *First Nat'l Maintenance*) alone, the Board considered 14 cases that involved management's duty to bargain over decisions which significantly affect bargaining unit jobs, i.e., cases in which the *Fibreboard-First Nat'l Maintenance* analysis is relevant, if not decisive; (1) Key Coal Co., 240 N.L.R.B. 1013 (1979) (lease of mining properties by newly-unionized employer violated § 8(a)(5)); (2) ABC Transnational Transport, 244 N.L.R.B. 660 (1979) (union which had notice and discussion of shutdowns waived right to bargain over decision itself); (3) Raskin Packing Co., 246 N.L.R.B. 78 (1979) (employer had no duty to bargain over closing following loss of credit, but violated § 8(a)(5) by direct dealings with employees after shutdown); (4) Lauer's Furniture Stores, 246 N.L.R.B. 360 (1979) (employer who sold store had duty to bargain over "effects"); (5) Brooks-Scanlon, Inc., 246 N.L.R.B. 476 (1979) (shutdown caused by exhaustion of resources, lumber for mill, not a mandatory subject); (6) National Family Opinion, Inc., 246 N.L.R.B. 521 (1979) (termination of printing department violated §§ 8(a)(1), (3), and (5)); (7) Borg-Warner Corp., 245 N.L.R.B. 513 (1979) (employer had duty to bargain over effects of transfer of business to its alter ego), *enforced*, 663 F.2d 666 (6th Cir. 1981); (8) Markel Mfg. Co., 239 N.L.R.B. 1142 (1979) (unilateral layoffs violated § 8(a)(5)); (9) General Elec. Co., 240 N.L.R.B. 703 (1979) (no duty to bargain over subcontracting to test new technology which had little impact on bargaining unit employees); (10) Merryweather Optical Co., 240 N.L.R.B. 1213 (1979) (employer who totally closed business for economic reasons had no duty to bargain over decision, but violated duty to bargain over effects); (11) Alexander Linn Hosp. Ass'n, 244 N.L.R.B. 387 (1979) (employer violated § 8(a)(5) by unilaterally subcontracting bargaining unit work without disclosing and discussing at concurrent negotiations for new collective bargaining agreement); (12) Upper Mississippi Towing Corp., 246 N.L.R.B. 262 (1979) (no duty to bargain over subcontracting where employer had good faith doubt of union's majority status); (13) Universal Marine Corp., 246 N.L.R.B. 445 (1979) (termination violated §§ 8(a)(1), (3), and (5)); (14) Equitable Gas Co., 245 N.L.R.B. 260 (1979), (employer violated § 8(a)(5) by unilaterally subcontracting to adopt technological change), *enforcement denied*, 637 F.2d 980 (3rd Cir. 1981).

treatment evolved from the simple and absolute to the complex and relative. While it had announced early that decision-bargaining in general creates "no significant intrusion on managerial freedom,"³⁶¹ it later determined that managerial interests predominate in decisions which involve a "significant investment or withdrawal of capital, affecting the scope and ultimate direction of an enterprise."³⁶² Furthermore, it found the employee interest to be nullified where a closing resulted from an economic emergency that rendered bargaining futile.³⁶³

The wise course for the Court would have been caution. Such caution has long been embodied in the Court's doctrine of deference, which requires that "if [the Board's] construction of the statute is *reasonably defensible*, it should not be rejected merely because the courts might prefer another view of the statute."³⁶⁴ Unfortunately, in other cases the Court has substituted its judgment for that of the Board without explaining why deference was inappropriate.³⁶⁵ Nonetheless, deference should not be treated as a mere makeweight. Given the relative competences of the courts—including, perhaps especially, the Supreme Court—and the Board, it is particularly appropriate for the courts to yield to the Board in determining the scope of mandatory bargaining.

As recently as *Ford Motor Co. v. NLRB*,³⁶⁶ the Court insisted that the Board's determination of mandatory subjects should be accorded "considerable deference."³⁶⁷ The Court offered two reasons, both of them as applicable to *First National Maintenance* as to *Ford*. First, Congress rejected attempts to specify the subjects of mandatory bargaining in favor of an express delegation of broad authority to the Board. This "conscious decision to . . . delegat[e]"³⁶⁸ must be respected unless the delegation is

³⁶¹ *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 569 (1966).

³⁶² *General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971).

³⁶³ *See e.g., Raskin Packing Co.*, 246 N.L.R.B. 78 (1979).

³⁶⁴ *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488, 497 (1979). *Accord* *Charles D. Bonanno Linen Ser. v. NLRB*, 454 U.S. 404 (1982); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

³⁶⁵ Professor Kenneth Davis has criticized the Court at great length for announcing these two approaches to judicial review of administrative determinations of law, while evading the question of when it is appropriate to use one rather than the other. 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 30.01-30.11 (1958, Supp. 1970 & Supp. 1980). *See also* *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976).

³⁶⁶ 441 U.S. 488 (1979). *Cf. Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (deference not appropriate where agency created to umpire, rather than to make policy).

³⁶⁷ *Id.* at 495.

³⁶⁸ *Id.* at 496. The Administrative Procedure Act provides that "the court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions . . ." 5 U.S.C. § 706 (1976). But the Act specifically denies such judicial authority where "agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1976). *Ford*, and the legislative history cited therein, made it plain that the task of classifying subjects as mandatory or permissive was committed to the Board's discretion. Hence the appropriate test was whether the Board had abused this discretion.

unconstitutional.³⁶⁹ Second, the Board has "special expertise"³⁷⁰ in classifying the subjects of bargaining. Whether the Board has "expertise" or merely "experience" is debatable.³⁷¹ Nonetheless it is clear that the Board has had ample opportunity to consider the significance of decision-bargaining to employee and employer interests, its relationship to other aspects of labor-management relations, and the practical problems of proof and of manipulability under the alternative constructions. This experience, reflected in the evolution of Board doctrine, is precisely what Congress sought to bring to bear on a problem which it found not susceptible to prior legislative specificity.

The *Ford* Court did not mention two other equally cogent reasons for deference, based on the different characteristics of Board and judicial decision-making. The Board was designed to permit experimentation³⁷² and to be more open to changing political winds than the Court.³⁷³ Because its members are appointed for only five years, and because it confronts the same or related problems many times in a short span, the Board "can pronounce rules, watch them in operation, and modify or abandon them as their impact is shown to be undesirable."³⁷⁴

The short term of Board members also encourages greater sensitivity to "the social and political climate at any given time."³⁷⁵ The extent to which *political shifts* in Board doctrine are desirable may be debated.³⁷⁶ But in the context of labor disputes, *political decisions*, whether by the Board or by the Court, are inevitable. As Clyde Summers put it: "There can be no impartial rules governing the relationship between a tree and the woodman's ax, even though we let the chips fall where they may."³⁷⁷ This in-

³⁶⁹ See *Schector Poultry Corp. v. United States*, 295 U.S. 495 (1935). Cf. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., & Burger, C.J., dissenting) (Congress "unconstitutionally delegated to the Executive Branch the authority to make the 'hard policy choices' properly the task of the legislature.").

³⁷⁰ 441 U.S. at 495 (quoting from *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965)). Cf. *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 50 (2d Cir. 1976) (no deference required to umpiring agency that had no experience under new statute).

³⁷¹ See, e.g., Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 60.

³⁷² *Id.* at 63-64.

³⁷³ *Id.* at 64-67; Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954); Murphy, *The National Labor Relations Board—An Appraisal*, 52 MINN. L. REV. 819 (1968).

³⁷⁴ Winter, *supra* note 371, at 63.

³⁷⁵ H.R. REP. NO. 245, 80th Cong., 1st Sess., 71 (1947) (minority report), reprinted in 1 LEG. HIST. LMRA, *supra* note 54, at 362.

³⁷⁶ Winter, *supra* note 371, at 64-67. Consider, for example, the Board's zigzag decisions on regulation of campaign misrepresentations. See *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962) (regulated); *Shopping Kart Food Market*, 228 N.L.R.B. 1311 (1977) (deregulated); *General Knit*, 239 N.L.R.B. 619 (1978) (reregulated); *Midland Nat'l Life Ins. Co.*, 110 L.R.R.M. 1489 (1982) (re-deregulated).

³⁷⁷ Summers, *supra* note 373, at 97.

herent partiality explains why such decisions should be made by the more responsive institution.³⁷⁸

Moreover, none of the reasons that have traditionally been offered for refusing to defer in particular cases apply to *First National Maintenance*. First, where an agency fails to articulate the experiential or factual basis of its construction, a court cannot determine the reasonableness of the outcome; hence, the court must decide the question de novo or remand to the agency.³⁷⁹ While the Board has often been criticized for failing to disclose the facts or the reasoning underlying its judgments,³⁸⁰ that can hardly be said of its decision-bargaining opinions.³⁸¹

Second, where an agency fails to apply a "proper legal standard . . . or . . . to give the plain language of the standard its ordinary meaning," no deference is due.³⁸² Unlike the cases to which this exception has been applied, *First National Maintenance* involved no narrow and clear statutory standard or definition.³⁸³

Third, where a Board decision is "fundamentally inconsistent with the structure of the Act and the function of the sections relied upon,"³⁸⁴ the Court may refuse to follow it. If the doctrine of deference is to serve the functions ascribed to it above, this limitation can only apply in cases of clear error, not to "error" based on inference piled on inference from some vague "ulterior purpose."³⁸⁵ Likewise, it would be inappropriate where the Agency was specifically delegated policy-making authority.

³⁷⁸ In *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), the Court announced that "regulatory legislation . . . is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis within the knowledge and experience of the legislators." *Id.* at 152. The Court, of course, went on in its most famous footnote to suggest a "narrower scope" for deference in cases involving legislation which seems to conflict with a "specific constitutional prohibition," or "which restricts [the] political processes," or which burdens "discrete and insular minorities." *Id.* at 152 n.4. If Congress may delegate its policy-making power under only the most general guidelines, as it did in § 8(d), and if *Carolene Products* correctly describes the judicial role in reviewing legislation, then the Court owed the Board deference in this case.

This theory may help to explain the contours of judicial deference to administrative agencies. If Congress specifically delegated authority and if the delegation was proper, deference is owed. This interpretation is fully consistent with the judicial review provisions of the Administrative Procedure Act. *See supra*, note 368. *Cf. WELLINGTON, supra* note 155.

³⁷⁹ *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 47 & n.13, 50 (2d Cir. 1976).

³⁸⁰ *See, e.g., NLRB v. General Stencils, Inc.*, 438 F.2d 894, 904 (2d Cir. 1971).

³⁸¹ The Board's opinion in *Ozark Trailers, Inc.*, 161 N.L.R.B. 651 (1966), demonstrates thorough consideration of the issues. In fact, the Board there discussed crucial factors which the Court in *First Nat'l Maintenance* apparently did not consider, for example, the relationship between effects-bargaining and decision-bargaining. That the Board issued a summary opinion in *First Nat'l Maintenance* should make no difference; the case raised no point which the Board had not thoroughly considered in the past.

³⁸² *Ford Motor Co.*, 441 U.S. 488, 497 (1979).

³⁸³ *Cf. Allied Chemical Workers Union v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971) (retirees are not employees).

³⁸⁴ *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

³⁸⁵ Judge Friendly has suggested that this exception could swallow the deference princi-

In sum, all of the policies that counsel deference generally—congressional intent, experience, the capacity to experiment, and political sensitivity—pointed to deference in *First National Maintenance*. No reason for not deferring in the particular case appeared. The Court's fundamental error was to assume that it "is the institution best suited to make labor policy."³⁸⁸ Its arrogation of a function which Congress clearly intended for the Board was unjustified.

CONCLUSION

If *First National Maintenance* is broadly construed to insulate managerial autonomy, it will pose a serious threat to the system of employee free choice which lies at the core of our national labor policy. The test which the Court announced for determining whether a subject which directly and significantly affects employee job security is mandatory or permissive seriously discounts employee interests, while exaggerating those of management. The Court's application of that test to the facts in *First National Maintenance* itself suggests that it will be all too easy for determined, antiunion employers to manipulate the "facts" in order to frustrate their employees' decision to unionize.

Nonetheless, such a test might be appropriate if it were necessary to fulfilling the ultimate purpose of the Act. But, in fact, the Court's approach to weighing the competing interests is deeply inconsistent with the congressional policy judgment that employee free choice must be protected to reduce the long range risk of industrial unrest. Moreover, it is clear that Congress specifically delegated to the Board the task of deciding which subjects are mandatory and which are not.

Yet, unless it is overruled by the Supreme Court or negated by plant closing legislation, *First National Maintenance* stands as the law of the land.

ple whole:

In . . . *Morton v. Ruiz*, 415 U.S. 199, 237 . . . (1974) . . . the Court held that "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose"; this very nearly eliminates the "deference" principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference.

Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976).

Ruiz involved welfare claims of Indians living near but not on a reservation. The Bureau of Indian Affairs denied the claims without complying with its own procedures. Moreover, the BIA misrepresented the coverage of its rules to Congress. In sum, the agency violated the "trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." 415 U.S. at 236 (quoting from *Seminole Nation v. U.S.*, 316 U.S. 286, 296 (1942)). Indeed, none of the policies which support deference, see *supra* notes 359-84 and accompanying text, was relevant in *Ruiz*.

³⁸⁸ Winter, *supra* note 371, at 73.

While the Court's solicitude for "management's fear of later evaluations labeling its conduct an unfair labor practice" suggests that only a broad reading of the decision is consistent with the Court's construction of the Act, the opinion itself suggests a number of bases on which the Board (and/or the courts of appeals) can reduce its impact.³⁸⁷ First, the Court insulated only the employer's *decision* to close a specific part of its business. Thus, the Board should distinguish decision-bargaining from effects-bargaining, as well as from bargaining over a possible future closing decision. Second, the Court interpreted the decision as one that *permanently terminated* a distinct part of the employer's business. Hence, the Board should also distinguish employer decisions after which the employer will continue to provide the same product or service in the same market. Third, the Court emphasized that FNM's motivation (as found by the A.L.J.) was purely economic. The Board should develop appropriate standards for the burden of proof on this issue. Because *First National Maintenance* was decided under section 8(a)(5), rather than section 8(a)(3), the analogy to the standards of *Darlington* is clearly inappropriate.

Given the present political composition of the Board, it is not likely to

³⁸⁷ John Irving, the former NLRB General Counsel, has argued that the Court's mandate was clear and should be read broadly. *Supra*, note 29. He noted that "the decision to close or sell at a particular location [seldom] rest[s] on the pure determination that it is best for the enterprise to go out of business entirely . . . in that area." *Id.* at 225. Hence, if the "uncertain[ty] about which the Supreme Court was so critical," *id.* at 226, is to be avoided, partial closings must be broadly defined and determination of the duty to bargain on related business decisions must be determined on general principles, rather than case by case.

Irving's argument would be persuasive if the Court mandate were clear; but it is not. The Court expressly held only that a management "dec[isi]on . . . to shut down part of its business purely for economic reasons" is not a mandatory subject of bargaining. 452 U.S. at 686. The Court recognized the Board's authority to require effects bargaining "in a meaningful manner and at a meaningful time." *Id.* at 682. It left open the question of criteria to distinguish a partial closing from other similar business decisions. *Id.* at 686 n.22. Moreover, it failed to articulate the meaning of "purely . . . economic reasons" or to allocate the burden of proof. *Id.* Finally, the Court tacked on a lonely paragraph of "specific facts" to the opinion—"to illustrate the limits of [its] holding." *Id.* at 687.

Thus it appears that Irving missed the point when he claimed that a case-by-case application of *First National Maintenance* would ignore the Court's "clear signal." Irving, *supra* note 29, at 226. The Court sent not one clear signal, but two distinct and conflicting signals, as even a casual examination of the Court's limiting facts should make plain. One cannot heed these facts and, at the same time, give employers confidence that their decisions will be free from "later evaluations."

The explanation is obvious: What appeared to be a clear majority set to defend managerial autonomy included some justices who were not prepared to go nearly that far. Why these justices chose to join the Court's opinion rather than to concur in the judgment and why the majority chose to accept the limiting paragraph are questions the answers to which are not vouched to supplicants of the Oracle. See Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (explaining inconsistent decisions in terms of the theory of social choice). Nonetheless, the dissonance invites the Board and the courts to treat *First National Maintenance* not as a general rejection of employee interests in bargaining over job security, but rather as the beginning of analysis. This author is presently working on an article exploring these limiting possibilities in more detail.

accept the challenge of developing limitations on *First National Maintenance*. Yet the absence of such limitations may lead to increased pressure for plant-closing legislation. It would be ironic if the ultimate result of *First National Maintenance* were the imposition of much more extensive limitations on managerial autonomy.